In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1965

No. [redacted] 18

UTAH PIE COMPANY,
Petitioner,

vs.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 25, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in CCH 1965 Trade Cases, par. 71,468. A copy of the opinion is attached hereto as

Appendix A. No opinions were issued by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 25, 1965 (R. 5). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The Court of Appeals reversed a judgment entered on a jury verdict in favor of petitioner because it found no evidence sufficient to support the jury's verdict that respondents' price discriminations were reasonably likely to substantially lessen competition or to tend to create a monopoly, within the meaning of Section 2(a) of the Robinson-Patman Act. The undisputed facts showed:

a. That petitioner was a small corporation, with limited financial resources, engaged solely in the business of making fresh and frozen pies, which it sold in the intermountain area, where it had the only pie plant;

b. Respondents were all large corporations, each engaged in a variety of businesses of which its frozen pie business was a small part;

c. Respondents all had substantial resources in the form of multi-million dollar over-all profits;

d. Respondents all distributed frozen pies throughout all or most of the United States;

e. Respondents all sold substantial numbers of frozen pies in the area in which they competed with petitioner

at prices below the prices which respondents charged for pies of like grade and quality in areas in which they did not compete with petitioner;

f. Respondents had net losses on their sales of frozen pies in the area in which they did compete with petitioner; and

g. Prices in petitioner's trading area fell and petitioner's market share declined.

The questions presented are:

1. Are these facts alone sufficient to sustain a jury's verdict finding a reasonable likelihood of a substantial lessening of competition or a tendency to create a monopoly arising out of respondents' price discriminations?

2. Are these facts sufficient to sustain the jury's verdict if there is also evidence that there were 200 manufacturers of frozen pies in the United States, but that only petitioner and respondents made more than sporadic sales in the area in which petitioner sold frozen pies?

3. Are these facts sufficient to sustain a jury's verdict if there is also evidence that each respondent's price discriminations were motivated by predatory intent directed at petitioner?

4. Is evidence that a respondent planned in advance to take losses on frozen pie sales in the area in which it competed with petitioner evidence of predatory intent?

5. Is evidence that a respondent indulged in industrial espionage to obtain information for use against petitioner evidence of predatory intent?

6. Is evidence that a respondent's discriminatory low price in petitioner's trading area cut substantially below

the lowest price level ever theretofore seen in that area evidence of predatory intent?

7. Can a difference between a manufacturer's price for its proprietary, "name" brand in one geographic area and the manufacturer's price for a substantially identical "private label" product in a different geographic area be an unlawful price discrimination under Section 2(a) of the Robinson-Patman Act?

8. Is diversion of business to the discriminating seller the only criterion of competitive effect of a manufacturer's discriminatory price for a "private label" product, or should the Court of Appeals also have considered evidence of the impact of discriminatory prices for private label products upon the general price level in the market as a whole, and its probable ultimate effect upon the structure of the market?

9. Did the Court of Appeals, in overturning the jury's verdict, place unwarranted reliance upon post-complaint evidence by ignoring the reasonable inference that respondents ameliorated their pricing practices after the complaint in this action was filed?

10. Did the Court of Appeals, in overturning the jury's verdict, improperly rely upon the testimony of two interested defense witnesses who petitioner contended were lying, and whose credibility was a principal issue in the case?

11. Did the Court of Appeals, in overturning the jury's verdict, improperly treat an "advertising allowance" as a "discount" where the unequivocal testimony of several witnesses was that an advertising allowance is *not* a price cut?

12. Could the Court of Appeals properly disregard the evidence of respondent Continental's Denver price discriminations, on the grounds that the district court's charge did not submit that issue to the jury, and then order entry of judgment in favor of Continental without a new trial?

13. Did the Court of Appeals, in overturning the jury's verdict on grounds of insufficient evidence, usurp the function of the jury, and deny petitioner's constitutional right to trial by jury, by failing to consider the evidence in the light most favorable to petitioner, and by failing to give petitioner the benefit of all reasonable inferences from the evidence so considered?

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1952), and Sections 3, 4 and 16, of the Clayton Act, 38 Stat. 731, §§ 3, 4, and 16 (1914), 15 U.S.C. §§ 14, 15, and 26 (1952); U.S. Const. amend. VII. These statutes are set out in Appendix C.

STATEMENT

This was an action brought by petitioner against three competitors, respondents here, to recover damages suffered by petitioner as a result of respondents' violations of the antitrust laws. The jury brought in verdicts finding that each respondent had individually violated Section 2 of the Clayton Act, to the injury of petitioner in stated

amounts (Tr. 1283-1284). This, then, is a "primary line" price discrimination case.[1]

The Court of Appeals concluded (in 88 printed pages—Appendix A to this Petition) that the evidence was insufficient to support the jury's verdicts. It ordered that judgment be entered for respondents without any further trial (R. 5).

Before launching into its examination of the facts of this case, the Court of Appeals stated its standard of review as follows:

> "Certain facts, if set out and considered in isolation, would present a distorted picture of these cases. To get a true perspective of them, the whole factual picture and the relation of each of the facts to each other must be brought into proper focus. . . ." (App. A, p. 3)

The Court of Appeals then proceeded to bring the facts of the case into what it considered to be the "proper focus."

The evidence relied upon by petitioner to sustain the verdict showed the following facts:

---

[1]The jury failed to find that respondents had conspired to fix prices, and had agreed to try, by that means, to destroy petitioner's business in violation of Section 1 of the Sherman Act (Tr. 1284). Petitioner did not appeal that issue.

The jury did find that petitioner had violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act, to the injury of respondent Continental Baking Company (hereinafter "Continental") in the amount of one dollar (Tr. 1284). The trial court entered judgment for petitioner n.o.v., Continental appealed, and the Court of Appeals remanded with instructions to grant petitioner a new trial (R. 5).

These matters are not raised on this Petition.

1. Petitioner.

Petitioner Utah Pie Company is a Utah corporation owned by the Rigby family of Salt Lake City. At the time of trial, it had been in business for some 30 years, making fresh baked pies which it sold in Utah, Nevada, Colorado, New Mexico and Wyoming (Tr. 482). At the time of trial, most of the operation of the business was in the hands of the younger generation of Rigbys—four young men, all of whom had started working in the plant part-time when they were in grade school (Tr. 437, 442, 464, 465, 481). Of the 18 employees in the plant, 9 were members of the Rigby family (Tr. 465).

In about August of 1957, petitioner began freezing pies as well as baking them (Tr. 483). In the ensuing four fiscal years, it sold frozen pies in the states of Utah, Idaho, Nevada, Wyoming, Montana, Colorado, California, Oregon and Washington (Pl. Ex. 82).

In 1958, petitioner opened a new pie plant (Tr. 1052). It was a well-managed plant with an advantageous location (Tr. 141). A Safeway quality control man who inspected petitioner's plant said that the production machinery was satisfactory and that the plant was the cleanest he had ever been in (Tr. 455). Petitioner had the only pie manufacturing plant located in the intermountain area (Tr. 141, 443).

Petitioner's product throughout the period in controversy was a 24 ounce, 8 inch diameter, frozen fruit pie in the flavors apple, cherry, boysenberry, blueberry, pumpkin and mince (Tr. 483, 784). A peach flavor was added in August 1960 (Pl. Ex. 4). Petitioner's original brand was "Utah Pie" (Tr. 728). Later, it added "Frost 'N

Flame," which was a "controlled label" of Associated Grocers in Utah and Idaho but petitioner's brand elsewhere, including Denver (Tr. 509, 707). Petitioner also packed "Sonny Boy" for Roundup Grocers in Spokane, a "Mayfresh" label for American Food Stores in Ogden and some seasonal pumpkin and mince pies under the "Bel Air" label for Safeway (Tr. 473, 501, 663, 698).

The quality and efficiency of petitioner's operation is best attested to by a two-page memorandum prepared by Boyd F. Schenk, general manager of the Frozen Foods Division of respondent Pet Milk Company (hereinafter "Pet") after a clandestine visit to petitioner's plant (Pl. Ex. 38). Schenk said, inter alia:

> "*Housekeeping and Sanitation.*—While the plant was somewhat cluttered, housekeeping and sanitation appeared entirely satisfactory. . . .
>
> "*Conclusion.*—From a competitive point of view Utah Pie Company has the following advantages:
>
> 1. Low overhead due to family management.
> 2. Non-Union labor force.
> 3. Freight advantage into intermountain markets.
>
> . . .
>
> "As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves. . . ." (Pl. Ex. 38).

Respondents' witnesses also testified that petitioner's pies were of high quality (Tr. 141, 876).

2. Petitioner's Marketing Area.

Before it added its line of frozen pies in 1957, petitioner was selling fresh-baked pies in the states of Utah, Nevada, Colorado, New Mexico and Wyoming (Tr. 482). During the four years preceding the filing of the complaint in this action, petitioner sold frozen fruit pies in the states of Utah, Idaho, Nevada, Wyoming, Montana, Colorado, California, Oregon and Washington (Pl. Ex. 82).

Dr. Roice Anderson, the Utah State Professor retained by the defendants jointly as an economics expert (Tr. 1006), testified that Washington, Oregon, Montana, Wyoming and Denver, Colorado, were within the "relevant market" of petitioner's business (Tr. 1035-36).

Dr. Anderson testified that he "would expect" petitioner to have most of the business in the immediate area of its plant (Tr. 1035). He further testified that it would not be unusual if petitioner's market share was zero in Fresno, California (where a Pet plant is located), or in Frankfort, Michigan (where another Pet plant is located) (Tr. 1036-37).

3. Advertising Allowances Are Not Price Cuts.

In establishing respondents' price discriminations, petitioner compared their net prices in petitioner's trading area with their net prices in other areas. In pricing pies, respondents used list prices from which they made "off invoice" discounts (Tr. 131, 423-424). They also sometimes offered advertising allowances, in return for the purchaser's obtaining advertising of their products (Id.).

Two of respondents' officers testified to the effect that advertising allowances are *not* price cuts (Tr. 131, 424).

The Court of Appeals nevertheless held:

> "In effect, the advertising allowance is a discount, and fixes the net per case price of the pies purchased." (App. A, p. 13)

As will appear hereinafter, petitioner's price comparisons do not always correspond to those of the Court of Appeals, since petitioner relied upon the evidence that advertising allowances are *not* discounts, while the Court of Appeals rejected it.

4. Respondents.

Respondents are all Delaware corporations with annual sales in the hundreds of millions of dollars and profits in the millions of dollars (Pl. Ex. 31). Respondents Continental and Pet had national distribution of frozen fruit pies (Tr. 807, 230). Respondent Carnation covered the west, from approximately the Mississippi River (Tr. 427). All respondents entered the frozen pie business by acquiring existing pie companies (Tr. 230, 342, 409). All sold frozen fruit pies in the states where petitioner did business during each of the years covered by the complaint (Pl. Ex. 62).

In 1961, according to figures compiled by respondents' economics expert, each respondent sold more frozen fruit pies in the immediate area of Salt Lake City than did all "other" sellers (i.e. not parties to the lawsuit) combined (Pl. Ex. 62, p. 5).

a. Pet.

Respondent Pet's total net sales increased in every full fiscal year covered by the damage period of the case (Pl.

Ex. 31). Its *smallest* net profit before taxes in any of those years was in excess of $7 million (Id.). However, Pet consistently lost money on frozen pies throughout the damage period of this case (Pl. Ex. 21).

Pet's high-priced proprietary label is "Pet-Ritz" (App. A, p. 8). Pet's losses on Pet-Ritz in its Salt Lake Division were greater than its losses elsewhere in 1958 and 1959; information for later periods was not available (Tr. 189). Pet always planned losses for Salt Lake (Pl. Exs. 7A, 7B; Tr. 349).

Pet's marketing efforts in Salt Lake City (to say nothing of the rest of petitioner's trading area) were markedly successful. In 1958, Pet had 16.4% of the total Salt Lake market (D. Ex. PA-35). In 1961, Pet had 29.4% of the total Salt Lake market, although its nearest plant was hundreds of miles away (Id.). In the year 1959, Pet sold more frozen fruit pies in Salt Lake than any other seller, and had 35.5% of the total market (Id.). Pet's share of the advertised brand market (i.e. other than private labels) was even more pronounced; by 1961 Pet was easily the largest seller, with almost 38% of the market (Pl. Ex. 96).

Pet had easily the largest market share of the United States' "quality" frozen pie market in 1958 and 1959 (Pl. Ex. 61).

After 1957, Pet had three pie plants to supply the entire United States. One was at Fresno, California, another at Frankfort, Michigan, and the third at Chambersburg, Pennsylvania (Tr. 923-925).

Pet's original "Pet-Ritz" product was an eight inch pie weighing 24 ounces. In 1959, Pet introduced its 20

ounce "Swiss Miss" pie which ". . . competes with . . . the economy pie factor of the market, and these generally are the regional pie brands. . . ." (Tr. 393).

Pet also packed "Bel Air" label pies for Safeway Stores under a total requirements contract (Pl. Ex. 42). The Bel Air pie is "substantially the same product" as the Pet-Ritz pie (Tr. 355). Pet's sales of Bel Air label pies began in 1959 and continued through to the date of the complaint (D. Ex. PA-35; Tr. 1054). The Safeway Bel Air business was highly important to Pet, amounting to 63,000 dozen pies (126,000 cases) in the immediate Salt Lake City area in the years 1959, 1960 and 1961 (D. Ex. PA-35). Safeway was also the largest buying organization in Denver (Tr. 685).

b. Pet's Price Discriminations.

Every Bel Air pie Pet sold to Safeway was sold at discriminatory prices (Pl. Ex. 42). As the chart attached to Pet's Safeway contract demonstrated, Pet was selling Safeway a Bel Air pie "substantially the same product" (Tr. 355, 1252) as the Pet-Ritz pie at prices which were always lower than the prices of the comparable Pet-Ritz pies in the same markets (Pl. Ex. 42). The price differences ranged as high as $.77 per case ($1.54 per dozen) in petitioner's trading area (Id.).

Compare also the Court of Appeals' table of the lowest San Francisco prices for Pet's Pet-Ritz brand (App. A, p. 23) with the prices of Pet's substantially identical Bel Air pie in Salt Lake City on the same dates (D. Ex. PA-35, p. 17).

Pet's only documentary evidence of a cost justification for these price differences covered only the last five

months prior to the filing of the complaint (Pl. Exs. 43, 44). It thus does not cover the 1959 and 1960 sales. It is, in form, a broad average of prices and costs over a large area and all flavors of pies (Id.). It purports to justify a price difference of no more than $.4980 per case ($.9960 per dozen), if believed, whereas the prices of Bel Air in Salt Lake were often more than a dollar a dozen less than the prices of the comparable Pet-Ritz pies in other areas.

The Court of Appeals nevertheless held unequivocally that "the difference in cost justified the difference in price" (App. A, p. 17).

Pet's willingness to give Safeway unjustifiably low prices on Bel Air pies was undoubtedly the consideration which caused Safeway to make Pet its exclusive supplier of Bel Air pies. The exclusive nature of the Safeway contract based on flagrant discriminations in price precluded Utah Pie from competing for Safeway business in Salt Lake and Denver where it had the advantages of convenient location and low labor costs—advantages which would have given it an edge in competition with Pet's relatively disadvantageous location and high cost of operation (Pl. Ex. 38; Tr. 141, 143, 650). As Pet's espionage report on Utah Pie made clear, there were "very few points where they [Utah Pie] would have a problem" with Safeway (Pl. Ex. 38).

Furthermore, the chart attached to Pet's Safeway contract showed on its face the price discriminations between Pet-Ritz prices in various marketing areas (Pl. Ex. 42). It showed, for example, that while the Pet-Ritz price for apple was $2.32 in California, it was $2.16 in Salt Lake (Id.). It showed that while the price for Pet-Ritz cherry

was $2.44 near Pet's California plant, it was $2.16 in petitioner's trading area (Id.).

Any doubt about whether Pet actually made sales at their quoted prices was dispelled by Pet's invoices for Northern California and for various places in petitioner's trading area (Pl. Exs. 116-123). Pet's highest, lowest, and median prices for each of the years covered by the complaint were compiled by respondents' economics experts in Pet. Ex. PA-35, based upon actual sales information obtained from the principal wholesale houses in the Salt Lake area (Tr. 972).

c. Continental Baking Company.

Respondent Continental entered the frozen food business by acquiring the Morton Packing Company on November 30, 1955 (Tr. 227; Pl. Ex. 1). In the years 1958 through 1961, Continental had total net sales in excess of one and one half billion dollars (Pl. Ex. 31; Tr. 208-209). Its total net profit before taxes was almost seventy-five million dollars (Id.). By any index, Continental's "Morton" was one of the two largest selling brands of frozen pies in the United States (Pl. Ex. 61).

Continental's "Morton" brand was well known in Salt Lake and over the years covered by the complaint, Morton was a "price leader", affecting the market price even on small volume (Tr. 725-727). Its 1961 price cuts in Salt Lake increased its volume 773% over the average of the three preceding years (See PA-35, pp. 2-5).

Continental's gross sales of frozen foods in certain western states (Regions VII and VIII through 1960 and W & I thereafter—See Tr. 195) were slightly in excess

of three million dollars for the years 1958 through 1961, but there was a loss of $12,500 instead of a profit (Pl. Ex. 31). Hereford, General Accounting Manager of the Morton Division of Continental, identified respondent's exhibits M-25 and M-26 which purport to show that Continental's frozen pie sales in Utah and Idaho were profitable (Tr. 586). He testified, however, that if Continental's costs had been allocated in those exhibits on the same basis which Continental used for its own internal purposes, there would be a loss (Tr. 589). Hereford testified that if Continental's whole business showed "gross profits" like those in its pie operation, it would be bankrupt (Tr. 591).

d. Continental's "Morton" Pie.

Respondent Continental's frozen fruit pies for sale throughout the United States were made in just three plants: Crozet, Virginia, Webster City, Iowa, and (after February 1961) by a contract packer in Watsonville, California (Tr. 61, 97, 688; Pl. Ex. 18). Continental shipped frozen fruit pies long distances back and forth across the continent from time to time (Tr. 61, 220, 491; Pl. Ex. 18).

In 1961, Continental was selling a 22 ounce apple pie in Salt Lake for $2.55 per dozen (Tr. 86; Pl. Ex. 14). At the same time it was offering Safeway a 24 ounce apple pie at $3.10 per dozen (Tr. 86). The difference in the cost of production was about 28 cents per dozen (Tr. 245).

Kitchin, Vice President in charge of Continental's frozen pie production testified that 22 and 24 ounce pies "appear to look the same" (Tr. 245). He was corroborated

by Halvarson, Morton's regional sales manager, who agreed that the only difference in appearance was that the 22 ounce pan had a slightly sharper slant, not quite discernible to the eye (Tr. 621). There was testimony that on the retail level most consumers cannot tell the difference between a 20 ounce, a 22 ounce and a 24 ounce pie (Tr. 785, 786), and Pet's 20 ounce Swiss Miss sold at retail prices higher than those of heavier competing pies (Tr. 136, 639). Lighter pies also commanded prices equal to or higher than heavier competing pies at wholesale (Tr. 740-741). In preparing his market share study respondents' economics expert concluded that "consumers buy pie as pie and not by the ounce" (Tr. 1021).

Nevertheless, the Court of Appeals persisted in viewing the prices of the 22 ounce Morton pie on "price-per-ounce" basis (App. A, p. 37).

e. Continental's Marketing System.

Continental refused to quote prices f.o.b. its plants; it used a zone delivered price system with various deviations between different places within its zone (Tr. 671).

Continental sold its Morton frozen foods through brokers (Tr. 597). The brokers were paid on a commission basis, based on sales volume, not profits (Pl. Ex. 19). Moreover, Halverson, Continental's sales manager responsible for dealing with brokers, was paid a bonus to increase sales volume without regard to whether the sales were at a profit or at a loss, and he did not know whether the sales he made were profitable to Continental or not (Tr. 627).

Continental's broker in Salt Lake as of the fall of 1960 was Stanley Chapman (Pl. Ex. 19). He testified that he was contacted by Halverson, western sales manager for Cantinental "about two weeks, ten days, it might have been a week" (Tr. 125) after a telephone conversation in which he had told Gaylen Rigby, petitioner's sales manager, that "he was going to obtain another frozen pie account, one that was a national brand; that he was going to get . . . Utah Pie." (Tr. 124, 513). Halverson placed the date on which he contacted Chapman as October 14, 1960 (Tr. 605). The letter by which Chapman was appointed, however, showed that he had actually been hired by Morton on September 26, 1960, prior to that conversation, and prior to his threatening conversation with Gaylen Rigby (Pl. Ex. 19).

Chapman immediately asked for, and got, a special promotional allowance (Tr. 130). About eight months later, Continental took Chapman's recommendation and cut its apple price to $2.55 per dozen, plus freight, for its Salt Lake customers (Tr. 131). At the time, Utah Pie apple was selling at $3.10 (Tr. 133). At the $2.55 price, Continental was losing 45¢ per dozen on its direct costs alone (D. Ex. M-9).

Nevertheless, the Court of Appeals accepted (and reprinted as Appendix VI to its opinion) Continental's exhibit M-22, a graph purporting to show that Continental was able to lay down apple pies in Salt Lake for $2.80 per dozen (App. A, p. 84).

f. Continental Engaged in Significant and Sustained Price Discrimination in Plaintiff's Trading Area.

Prior to 1961, Continental sold relatively few Morton pies in Salt Lake City (Pl. Ex. 110, PA-35). It did, however, sell substantial quantities throughout other important parts of petitioner's trading area. (See Denver invoices, Pl. Exs. 77-80, 83 and 89; Washington invoices, Pl. Exs. 84-87; Oregon invoices, Pl. Ex. 88).

The most direct evidence of Continental's prices and volume is its invoices (Pl. Exs. 10-14, 77-80, 84-89, 103). From those invoices, the jury was entitled to observe not only that Morton's apple price of $2.55 *per dozen* in Salt Lake City in the summer of 1961 was far lower than any price which any seller had theretofore charged in Salt Lake (see PA-35) but that it was $1.45 per dozen lower than a contemporaneous sale of 1800 dozen apple pies to Fox Markets in Los Angeles, California (Pl. Ex. 10). One day prior to the sale to Fox Markets (at $4 per dozen) Continental sold 550 dozen apple pies in Ogden, Utah for $2.59 per dozen and 25 dozen apple pies in Seattle for $3.50 per dozen (Pl. Exs. 10, 11, 12).

On July 20, 1961, Continental sold apple pies in Oakland, California, at $3.76 per dozen (Pl. Ex. 13). Oakland is 90 to 100 miles from Continental's Watsonville plant (Tr. 69). Eight days later, Continental sold 1,000 dozen apple pies to Grocers Wholesale in Salt Lake at $2.55 per dozen, freight prepaid (Pl. Ex. 14). Although Continental produced testimony to the effect that the "PPD" notations on some of its $2.55 apple pie invoices were in "error," it is undisputed that any Salt Lake buyer could have a "pickup allowance" of $.30 per dozen, resulting

in a price of $2.55 f.o.b. Watsonville, California, for Salt Lake buyers (Tr. 580).

There were substantial and continuing discriminations in the prices which Continental charged for its Morton pies in Denver, particularly after petitioner's initial success in selling Frost 'N Flame pies there in the fall of 1959. From a price of $3.93 per dozen for apple in May, 1959, Continental's price descended to $3.65 per dozen in December of the same year (Tr. 499; Pl. Ex. 89). In February 1960, apple pie was as low as $3.35 and in October 1950, it was down to $3.20 (Id.). In June 1961, Continental's Morton apple pie went as low as $3.00 in Denver (Id.). At that time, Morton apple pie was selling for some $4.00 per dozen in Los Angeles (Pl. Ex. 10).

In January 1960, Morton apple pie produced in Crozet, Virginia, was selling at $3.35 per dozen in Denver, freight prepaid by the seller (Tr. 491; Pl. Ex. 83). At that time, Continental's Morton apple pie was selling for $3.80 per dozen in Virginia, where the plant was located (Id.).

Some of the pies which Continental sold in Denver were produced at its Crozet, Virginia, plant, others were produced at its Webster City, Iowa, plant. Petitioner had a freight advantage on sales in Denver over Continental with respect to Continental's plants in California, Iowa and Virginia (Tr. 497).

Continental counsel initially objected to the introduction of evidence on Denver sales of Morton pies on the ground that Denver was not properly in the case (Tr. 489). He then read into the record what purported to be petitioner's answer to an interrogatory (Tr. 490). After counsel for petitioner pointed out that the interrogatory

answer had been amended (Tr. 493), Continental's counsel made his objection to the Denver invoices on the grounds that "I see no reason to burden the record with all these invoices" (Tr. 494).

Petitioner introduced evidence on Continental's frozen pie sales in Denver, Oregon and Washington (Pl. Exs. 77-80, 83-89), submitted damage exhibits claiming damage for all of those areas as against Continental (Pl. Exs. 97, 98) and argued the matter to the jury (Tr. 1161, 1163).

Petitioner's damage exhibits clearly claimed damages for loss of sales and for depressed prices in the Denver market (Pl. Ex. 98). The trial court charged the jury that, in considering damages, "you may also consider the exhibits which Mr. Caldwell [petitioner's accountant] has prepared and which have been admitted into evidence." (Tr. 1241).

Nevertheless, the Court of Appeals held that petitioner's judgment may not be sustained in any part by reference to the Denver market:

> "It is a theory clearly not submitted to the jury by the court in its charge, nor passed on by the jury." (App. A, p. 65).

g. Carnation.

Carnation entered the frozen pie business by acquiring "Mrs. Lee's Pies" in 1955 (Tr. 409-410). With that purchase, Carnation acquired the "Simple Simon" label and Carnation's Torrance plant (Tr. 409-410, 1105-1106). Carnation's 8 inch frozen fruit pies were the same 24 ounce weight as petitioner's (Tr. 1110).

Carnation was a large corporation with large financial resources. In 1958, its net sales amounted to over $378 million (Pl. Ex. 31). Its total net sales increased in every year covered by the damage period of the case (Id.). Its *smallest* net profit before taxes in any of the years 1958-1960 was in excess of $18 million (Id.). However, in the Pacific Northwest and Mountain States, where it competed with petitioner, Carnation's Frozen Foods Division had net *losses* (on all frozen products, including pies) before taxes in 1959, 1960 and 1961 (Id.). The figures for 1958 were not available (Id.).

Carnation pricing was on a delivered basis, by zones (Tr. 411, 1107). It did not offer pies on an f.o.b. plant basis (Tr. 1107). Carnation did not maintain the same price within its price zones; its price within zones varied because of the "competitive situation" (Tr. 1083).

Carnation's sales of frozen fruit pies in the Salt Lake area in 1960 resulted in losses ranging up to $.84 per dozen on a sales price averaging $3.04 per dozen (Pl. Ex. 28). In the Salt Lake area, Carnation's frozen pies generally sold at a loss throughout the years 1959, 1960 and 1961 (Id.).

During the same period, however, Carnation showed profits in its Frozen Food Division in Northern California and the Western Division as a whole (Pl. Ex. 22).

Carnation planned its losses in the intermountain area in advance (Tr. 405-406; Pl. Ex. 5). Carnation's 1959 budgets forecast profits of $96,000 in Southern California, $81,000 in Northern California and $3,300 for Arizona (Tr. 406-407; Pl. Ex. 5). Carnation's forecasts for the Pacific Northwest and Mountain States (the intermountain area; Washington, Oregon, Montana, Utah and

Idaho), called for losses of $12,648 in the Mountain States and $13,299 for the Pacific Northwest (Ibid.).

h. Carnation's Price Discriminations.

During the damage period of this case, Carnation consistently charged lower prices in plaintiff's trading area than the prices which it was charging in Northern California—an area of stable prices and consistent profits. (The exhibits showing Carnation's prices are Pl. Exs. 64, 65, 66, and Carnation Exs. C-B, C-C, C-D, C-E and C-F.)

In order to get its pies from Los Angeles to Salt Lake, Carnation had transportation expense of $.35 per dozen, plus about $.02 per dozen in spoilage (Pl. Ex. 28). Carnation has combined these expenses in its own exhibit (Carnation Ex. C-U). In calculating Carnation's price discriminations, however, petitioner has disregarded transportation and spoilage expenses and has simply compared Carnation's actual prices as shown on its price lists and as reduced by "off the face of the invoice" price reduction deals.

Carnation published price lists by zones (Tr. 411, 1087; Pl. Exs. 64, 65, 66). The actual price paid by Carnation's customers in petitioner's trading area, however, were often determined by "off the face deals" which reduced listed prices "off the face" of the invoices in particular areas for designated periods of time (Tr. 422). Carnation also offered advertising allowances. The advertising allowances were, however, "not price cuts" (Tr. 424). (But cf. opinion of the Court of Appeals, App. A, p. 13.)

Carnation's largest selling flavor of pie in Salt Lake was apple (Pl. Ex. 28, p. 2). The second largest selling

flavor was cherry (Id.). In each of the years 1958 through 1961, apple and cherry flavors combined accounted for the bulk of Carnation's Salt Lake sales (Id.).

With respect to both apple and cherry flavors, Carnation's *list* prices were the same in San Francisco and Salt Lake City for most of the damage period of the case; the discriminations were by way of direct discounts or rebates in petitioner's trading area at times when San Francisco purchasers were obtaining at most advertising allowances, which are "not price cuts." (See Pl. Exs. 64, 65; D. Exs. C-B, C-C, C-D, C-E and C-F).

Although there were times when prices on Carnation's apple and cherry were the same in San Francisco and Salt Lake City on a net price basis, there was never a price difference such that the low price was in San Francisco, although Carnation incurred substantially greater freight costs in shipping from Torrance, California, to Salt Lake City, Utah, than it did in shipping from Torrance to San Francisco. (Pl. Exs. 64, 65; D. Exs. C-B, C-C, C-D, C-E and C-F.)

The persistence of Carnation's Salt Lake discriminations in the prices which is charged for the two most important flavors of pie may be represented in tabular form as follows:

		No. of Days on Which Price Was Lower in Salt Lake	No. of Days on Which Price Was Lower in Northern California
1960	Apple	284	0
	Cherry	267	0
1961*	Apple	219	0
	Cherry	219	0

*251 days prior to filing of complaint.

The Court of Appeals, in its Appendix VII (as in other appendices to its opinion) purports to set forth "absolute prices" in conflict with the foregoing chart. (App. A, pp. 20-24, 45-47). The Court of Appeals' Appendix VII, however, is expressly based upon a definition of "absolute price" in conflict with the unequivocal testimony that an advertising allowance is "not a price cut." (Tr. 131, 424.) The Court of Appeals says:

> "By 'absolute price' is meant the list price, less any deals offered, whether direct discounts from invoices *or allowances for advertising.*" (App. A, p. 45.)

The pattern of Carnation's pricing in other parts of petitioner's trading area, and in other flavors, was similar to that on apple and cherry in Salt Lake City; list prices in Denver, other parts of Colorado, Wyoming, and Spokane, Washington were not uncommonly the same as the prices in San Francisco. (Pl. Exs. 64, 65; D. Exs. C-C, C-E, C-F). However, the cash discounts from list in petitioner's trading area, not matched in northern California, commonly produced lower net prices in petitioner's trading area than in San Francisco, a city eloser to Carnation's plant (Id.) At times, very substantial discriminations, adverse to petitioner, showed on the face of Carnation's Colorado-Wyoming price lists (Pl. Ex. 65).

5. Respondents Were Motivated by Predatory Intent.

Petitioner introduced evidence not only to prove respondents' price discriminations but also to prove that those price discriminations were motivated by predatory intent to hamper and eliminate petitioner as a competitor.

a. Pet Utilized a Combination of Predatory Tactics in Its Dealings in Petitioner's Trading Area.

Pet's intent is best illustrated by its program of intentional, prolonged below-cost sales of frozen pies, financed with money "borrowed . . . . from our total corporate operation." (Tr. 932.) This practice was euphemistically referred to as "investment spending". (Tr. 351, 932.)

Pet's "investment spending" program was aimed in part at petitioner, as shown by a memorandum from Pet's files. Pet's intermountain area sales manager stated, under "Unfavorable Factors Affecting Results", that "despite our steady growth generally there are factors at work that dig holes in our operation. Utah pies in the Salt Lake District are a constant 'check' on our growth." (Pl. Ex. 37.)

Pet also engaged in industrial espionage of petitioner's plant as a part of its monopolistic program. At a crucial moment in the negotiations for Safeway's Bel Air business, Schenk, the General Manager of Pet's Frozen Foods Division inspected petitioner's plant under false pretenses and prepared a report on his findings. (Pl. Ex. 38; Tr. 833 et seq.) The report was addressed to Dittman, contract sales manager for Pet (Pl. Ex. 38; Tr. 841, 857). The report was to be used by Dittman in disparaging petitioner to Safeway (Tr. 843-844). Copies of the report were circulated to L. G. Leutwiler, vice-president of production of Pet's Milk Products Division; Gordon Ellis, President of Pet's Milk Products Division and S. P. Harter, Pet's Senior Vice-President (Pl. Ex. 38, Tr. 842).

Subsequently, Pet got the Safeway business (at a discriminatory price) and petitioner lost out (Tr. 504; Pl. Ex. 42). Petitioner's sales manager testified that he had actually been promised some Safeway Bel Air business two days after Schenk's clandestine visit to petitioner's plant (Tr. 501-504). Young, the Safeway buyer denied that he had ever promised to give petitioner the Bel Air business, and explained that he was dissatisfied with petitioner's quality control (Tr. 1054).

Young, the Safeway buyer, also denied that any representative of respondent Pet had ever talked to him about conditions within petitioner's plant (Tr. 1053). However, "lack of technical quality control personnel" was one of the "points you might use" listed in Pet's espionage memorandum compiled for its Safeway contract negotiator (Pl. Ex. 38, p. 2). On the other hand, there was testimony that a Safeway quality control man who had inspected petitioner's plant had said that it was the cleanest he had ever been in (Tr. 455).

Faced with this conflicting evidence, the Court of Appeals said:

> "Of course, Pet's conduct was reprehensible and is not to be condoned. However, the information contained in Dittman's report was never conveyed to Safeway personnel. Dittman so testified, and so did Young, Safeway's buyer. It thus appears that the Dittman report was never used by Pet in its competitive efforts with Utah Pie." (App. A, p. 30.)

It should be noted that the Court of Appeals has thus accepted and relied upon witnesses whose veracity was called into question by petitioner's counsel (Tr. 1148-

1154). And Pet counsel reinforced that question of veracity at the outset of his summation:

> "Mr. Lamb: May it please the Court, ladies and gentlemen of the jury:
>
> "In my entire 30 years of law practice, I have never had one of my witnesses accused of being a liar. Three of my witnesses were accused by the opposition of being a liar—the head buyer for the Safeway Stores, the president of the Milk Products Division of Pet Milk Company, Mr. Dittman, chief contract officer for the Pet Milk Company . . ." (Tr. 1193).

Although Young, the Safeway buyer, was not employed by a party, there was evidence that his interest might be greater than appeared at first blush. A Pet internal memorandum, Pl. Ex. 47, said in part ". . . Young will act as a door opener for our sales people. . . ." The memo went on to say ". . . Young will encourage the Safeway Sales Division to stock Pet-Ritz flavors of 8" Fruit Pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz, both in quality and price. Young will send me a blind copy of the letter that goes to each Safeway Division, with the understanding our men are not to quote this letter." (Pl. Ex. 47.) Young's testimony on these subjects certainly puts the veracity of everyone involved in issue (See Tr. 1057-1059).

The espionage incident not only demonstrates Pet's predatory intent, but also undermines the conclusion of the Court of Appeals that "it was clearly established by uncontradicted, uncontroverted evidence that Safeway

was not willing . . . to purchase frozen fruit pies from Utah Pie, for the reason that it was unable to persuade Utah Pie to install means and procedures that would insure uniform quality. . . ." (App. A, p. 26.)

There was further conflict in the evidence on the quality-control issue; petitioner's plant engineer testified in substance that Safeway was satisfied with petitioner's quality control for several years, and that the quality control was really only a ". . . bunch of paper work, which didn't make any difference in the pie that ran through the machinery, except they wanted to know what we ran, when we ran it." (Tr. 451.)

Industrial espionage was not the only predatory device Pet used in competing with petitioner. Another predatory tactic which Pet employed was its "fighting brand", Swiss Miss. The Swiss Miss Pie was 4 ounces lighter than the Pet-Ritz and Bel Air brands, and sold at substantially lower prices (Pet Ex. PA-35). However, since the public ordinarily can't tell the difference between various weights of 8 inch pies (Tr. 785, 1021), Pet was able to sell large quantities of its underweight Swiss Miss to unsuspecting buyers. The purpose of the Swiss Miss was to ". . . meet price competition without endangering the consumer concept of Pet-Ritz quality" (Tr. 396; Pl. Ex. 61). The "price competition" which Pet had in mind was ". . . the economy pie factor of the market, and these generally are the regional pie brands. . . ." (Tr. 939.) Pet employed Swiss Miss in Salt Lake with a vengeance; although Pet-Ritz had larger sales volume than Swiss Miss nationally, Swiss Miss outsold Pet-Ritz almost 13 to 1 in Salt Lake in 1961 (Pet Ex. PA-35).

Finally, Pet's price discriminations themselves were highly significant evidence of predatory motive. As Dr. Anderson, respondents' economics expert, put it, Pet's lower prices at points more distant from its plant were "unnatural" (Tr. 1046). They were evidence of predatory pricing as "one of the possibilities" (Tr. 1034).

b. Continental Intended to Injure Plaintiff.

That Continental's discriminatory low prices were aimed directly at the petitioner admits of no doubt whatever. Morton's vice-president in charge of production, admitted it on the stand (Tr. 71, 100). So did Morton's regional sales manager; he had said that Morton's lowest price in Salt Lake "was aimed at him [petitioner] as a competitor to get business in his customers' account" (Tr. 615).

Continental's $2.55 price for a dozen apple pies in June of 1961 was below even the bare cost of production (Pl. Ex. 29). It was the lowest price which had ever been seen in the Utah market (D.Ex. PA-35). Making allowances for Continental's other costs, there were losses continuously from late 1958 on Continental's frozen pie sales in the Salt Lake area (Pl. Ex. 29; see also Tr. 105, 199, 588, 589, 615, 616).

c. The Evidence Showed Carnation's Predatory Intent.

Carnation sold its frozen pies in petitioner's trading area at prices below its cost (Pl. Exs. 22, 26, 28). It planned those losses in advance (Pl. Ex. 5). In the years 1959, 1960 and 1961, Carnation's Frozen Foods Division lost $141,413 in the Pacific Northwest and Mountain States (i.e. petitioner's trading area) but made $252,554

in Northern California (Pl. Ex. 22). During those same three years, Carnation's overall profits before taxes were $65,484,058 (Pl. Ex. 31).

Carnation Losses,
Petitioner's Trading Area

Year	Loss
1959	$16,547
1960	78,245
1961	46,621

Dr. Anderson, respondents' economics expert, testified that sales by a large corporation at a loss in a regional market, where that loss was planned in advance, would be evidence of some ulterior motive (Tr. 1040-1041). He also testified that if a company sold at lower prices 750 miles from its plant than it did at the plant door that it indicated "less than perfect pricing" and was "unnatural" (Tr. 1046). He further testified that the price decline in petitioner's trading area might have been the result of predatory pricing as "one of the possibilities" (Tr. 1034).

Carnation's long-continued losses in Salt Lake were not a result of any inadvertence or of any random, ad hoc, deviation from non-discriminatory pricing to meet sudden or transitory circumstances. They were the result of a carefully calculated zone pricing system controlled directly from the highest policy levels of Carnation—a committee of the Board of Directors (Tr. 1102, 1107).

The Court of Appeals passed over all this evidence smoothly:

> "At times during the period 1958 to 1961, Carnation's prices in the Utah Area were higher than those

charged in the Los Angeles area and at times they were lower. There was no relationship between the prices in the two areas. The price in each was determined by local competitive conditions." (App. A, p. 42.)

6. Respondents' Price Discriminations Had an Injurious Impact Upon Petitioner.

Petitioner claimed damages for injuries of three sorts: (1) loss of profits due to depressed prices; (2) loss of profits due to reduced volume; and (3) injury to the good will value of its business (Pl. Ex. 95). Petitioner demonstrated that respondents' activities had driven prices down sharply in the period after petitioner entered the business (See Pl. Exs. 4, 62; Pet Ex. PA-35). Petitioner demonstrated that in spite of its uniquely advantageous location, its high quality product and its modern and efficient plant its market share had diminished drastically (Pl. Ex. 96). Petitioner's unchallenged testimony also proved a diminution in the good will value of its business of $75,000 (Tr. 522).

a. Petitioner's Prices Were Driven Down.

The decline in prices which petitioner was able to get for its pies is clearly demonstrated for the immediate Salt Lake area by the study prepared by Dr. Anderson, respondents' economics expert (PA-35, pp. 8, 9). His study shows a decline in the average price which petitioner received for Utah brand apple pie from $2.15 per case ($4.30 per dozen) in February of 1958 to $1.60 per case ($3.20 per dozen) in August of 1961 (PA-35, pp. 8-9, "price"), a decline of about 26%.

The picture for petitioner's entire marketing area was very similar to that shown by Dr. Anderson's more limited study of the Salt Lake-Boise area (See Pl. Ex. 4).

Petitioners presented to the jury damage charts setting forth the amounts of damages which they asked the jury to find, predicated upon the jury's determining prices which would have prevailed in plaintiff's trading area but for respondents' price discriminations (Pl. Exs. 96, 97, 98, 101).

There was ample evidence from which the jury might have reasonably concluded that the declining price levels in petitioner's trading area were due to respondents' price discriminations, and that all price levels would have been substantially higher in the absence of those discriminations. In the first place, the jury could consider what respondents were charging in their areas of discriminatory *high* prices.

There was also direct testimony by a defense witness that in the absence of respondents' price reductions, the price level in the market would have stayed above $3.70:

> "Q. Now, Mr. Degenhardt, assume for me, if you will, that none of the three defendants' prices had changed in the Salt Lake City market from 1957 on, that they stood at the '57 price; would the price level in the market have stayed at $3.70 or above per dozen?
>
> A. I would say so, yes." (Tr. 659.)

b. Petitioner's Market Share Declined.

In addition to damages resulting from an erosion of the prices which it was able to obtain for its products, petitioner suffered a very substantial loss of business.

Petitioner's share of the market for "advertised" brand pies (i.e. other than private label) declined dramatically from 1958 to 1961 (Pl. Ex. 96). Starting with 70.41% of petitioner's and respondents' total sales in 1958, Utah Pie dropped steadily each year to 33.64% in 1961 (Id.). By contrast, every one of the respondents' shares increased; Pet moved up steadily from 17.32% in 1958 to 37.94% (and the largest seller of advertised brands in the market) in 1961 (Id.).

Shown graphically, petitioner's market share in the immediate Salt Lake City area for its advertised brand was as follows:

	Utah Pie
1958	70.41%
1959	58.69
1960	40.28
1961	33.64

(Source: Pl. Ex. 96.)

Considering sales of all brands in the market, including private label and sellers "other" than parties to the lawsuit, petitioner's market share was as follows:

	Utah Pie
1958	67%
1959	34%
1960	46%
1961	45%

(Computed from Pl. Ex. 62.)

Halgren, a Vice President of Carnation, testified:

"Increasing distribution doesn't necessarily mean increasing sales, and it doesn't mean by any means

that you are keeping pace with the market. Sometimes the market grows from 100,000 to 200,000 cases in a single year. *If you don't grow with that, you are not getting your share.*" (Tr. 1120; emphasis added.)

c. The Jury Verdicts Were Well Within the Evidence.

Petitioner's damage calculations as to Pet would have supported a verdict for $261,046 actual damages (Pl. Ex. 95). In fact, the jury returned a verdict of $44,197, well within the damages shown by the evidence against Pet (Tr. 39).

Petitioner's damage calculations would have supported a verdict of $381,197 against Continental (Pl. Ex. 95). In fact, the jury returned a verdict of $24,994 (Tr. 39).

Petitioner's damage calculations would have supported a verdict for $98,892 against Carnation (Pl. Ex. 95). In fact, the jury returned a verdict of $29,277 (Tr. 39).

REASONS FOR GRANTING THE WRIT

SUMMARY

By holding, as a matter of law, that the evidence in this case was insufficient to sustain a jury verdict for petitioner in a "primary line" price discrimination case, the Court of Appeals has effectively repealed Section 2(a) of the Robinson-Patman Act, insofar as it might otherwise protect competitors of a price-discriminating seller.

The basic, indisputable facts provide ample foundation for the jury's conclusion that respondents' regional price-cutting was likely to substantially lessen competition, and that it posed a dangerous threat of monopoly. There was,

in addition, ample evidence that respondents' regional price-cutting injured petitioner in amounts at least as great as the jury's damage verdicts.

The Court of Appeals nevertheless held, as a matter of law, that petitioner's evidence was insufficient to sustain the jury's finding of a reasonable likelihood of a substantial lessening of competition, or of a tendency to create a monopoly (App. A, pp. 57, 62-63, 65, 68-69).

This holding strikes down, as unreasonable and impermissible, inferences which are not only reasonable but well-nigh inescapable, as has been suggested by much prior precedent. The opinion of the Court of Appeals creates a precedent upon which large, well financed corporations may henceforth rely to justify their "investment spending" (Tr. 351, 932) in monopoly, to be obtained by prolonged below-cost selling, at discriminatory prices, in the marketing areas of small, regional competitors.

This case goes far beyond *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), relied upon by the Court, for in *Balian* the inquiry was whether the evidence supported a judgment in the trial court for the *defendant*. This decision, if unreviewed, must remain a dangerous anomaly in the law, confusingly conflicting with well considered opinions of other Circuits and of this Court, and an open invitation to predatory price-cutting as a means of expanding monopoly power.

The indisputable facts of the case are these:

Petitioner had the only pie plant in the intermountain area (Tr. 141, 443). Although petitioner had been in the

fresh pie business for many years, its principal product during the relevant period was frozen pies (Tr. 482-483). Petitioner's financial resources were comparatively nominal (Pl. Ex. 92).

Respondents were all large corporations, engaged in many diverse lines of endeavor, with great financial resources in the form of multi-million dollar profits from their over-all operations (Pl. Ex. 31). Each of the respondents sold frozen pies in petitioner's trading area at *discriminatory prices resulting in losses on those sales for protracted periods of several years* (Pl. Exs. 5, 7, 21, 22, 28, 29; Tr. 405-406).

Over the period of respondents' discriminatory pricing in petitioner's trading area, prices steadily declined, and petitioner's market share fell precipitously (Pl. Ex. 96). Although there were about 200 frozen pie manufacturers in the United States, none of them, other than petitioner and respondents, made more than a sporadic appearance in Salt Lake City (Pl. Ex. 62, p. 5). Respondents' pies sold in petitioner's trading area were made, variously, in Iowa, California and Virginia (Tr. 923-925, 61, 97, 688; Pl. Ex. 18).

Nevertheless, the Court of Appeals reversed and remanded with instructions to enter judgment for respondents, without further trial (App. A, p. 74).

The decision of the Court of Appeals was based upon its conclusion that none of the respondents ". . . by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake

City market, or that there was a reasonable possibility that [respondent], by price differences or other acts, would do so in the future . . .'' (App. A, 62, 65, and 69).

This conclusion is not just wrong. It creates a dangerous precedent in the light of the undisputed facts, since the Court of Appeals purported to consider the facts and inferences in the light best calculated to sustain the verdict. If the basic, indisputable facts of this case won't support a verdict, then Section 2(a) of the Robinson-Patman Act is a dead letter in primary-line cases.

But even if additional facts might be required before the jury could be permitted to infer that respondents' discriminations were likely to lessen competition or tended to monopoly, those additional facts are in the record. There is substantial evidence that each respondent *planned and intended* to injure petitioner and to hamper its ability to compete. (See STATEMENT, supra.) This evidence of predatory intent, together with the other facts mentioned above, provides a firm basis for the jury's finding, for intent carries with it the dangerous possibility of success. *Swift & Co. v. United States,* 196 U.S. 375 (1905).

The Court of Appeals' massive mistake, congealed in its peremptory order to the district court to forthwith enter judgment for respondents, is based upon a series of mistakes of law, at least two of which put it in direct conflict with other Circuits.

First of all, the Court of Appeals failed to treat section 2(a) of the Robinson-Patman Act as an ''incipiency'' statute, designed to outlaw discriminations which are likely to

injure competition *if permitted to continue.* Instead, the Court of Appeals relied upon post-complaint evidence which showed that (as of the date of trial) petitioner had not been bankrupted. This interpretation of the statute would permit a price-discriminating seller to avoid all liability under section 2(a) by modifying its conduct promptly when sued. This interpretation conflicts with decisions of other circuits holding that cessation of anti-trust violation does not insulate the wrongdoer.

The Court's conclusion that petitioner's 1958 market share of 66.5% in Salt Lake City "approached, if it did not in fact amount to a monopoly" (App. A, p. 69), is in flat conflict with the decision of the Fourth Circuit in the case of *Maryland Baking Co. v. FTC,* 243 F.2d 716 (4th Cir. 1957). (There, the small, regional competitor's market share started at 91.3% and fell to 58.2%.)

The Court of Appeals relied upon two defense witnesses' testimony to upset the jury verdict, apparently on the basis that their testimony was "uncontradicted." However, the credibility of both witnesses was a major issue in the case, and the Tenth Circuit's decision to accept and rely upon the questioned testimony put it in direct conflict with a long line of Second Circuit cases such as *Broadcast Music v. Havana Madrid Restaurant Corp.,* 175 F.2d 77 (2d Cir. 1949), holding that even an uncontradicted witness may be totally disbelieved.

In considering the impact of respondent Pet's discriminatory pricing of the Bel Air private label sales to Safeway Stores, the Court of Appeals has committed several serious errors of law. It has disregarded the re-

gional price discrimination made possible by Pet's two-brand selling. In considering only the question of whether or not petitioner lost sales to Pet, the Court of Appeals has disregarded the serious competitive impact of private label selling upon both the structure of the market-place and the prices received by all sellers in the market as a consequence. It has also chosen to find that Pet's private label price was "cost justified" although the evidence was equivocal, and the jury thought differently.

In the course of its opinion supporting its conclusion that the judgment of the district court should be reversed, the Court of Appeals has expressly rejected many inferences and ignored or minimized many facts upon which petitioners relied to support the verdict (See App. A, p. 3). In so doing, the Court of Appeals has not only deprived petitioner of the constitutional right to a jury trial, but has seriously impaired the possibility of antitrust enforcement through the medium of the private action.

This Court has held that a private antitrust plaintiff should not be deprived of a jury trial by summary judgment where ". . . motive and intent play leading roles . . . and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473. This Court should not now permit a Court of Appeals to deprive a private antitrust plaintiff of a jury trial, after a verdict, where summary judgment would have been clearly unwarranted.

REASONS

1. Prolonged Below-Cost Selling of a Particular Product in a Particular Geographic Area by Large, Diversified, National Sellers Showing Overall Profits Is in and of Itself Sufficient Evidence of Probable Substantial Adverse Effects Upon Competition.

The evidence showed that respondents all sold frozen fruit pies in petitioner's trading area not only at discriminatory prices but at money-losing prices. Those below-cost sales by all respondents continued for several years prior to the complaint in this action. Petitioner had the only pie plant in the area.

The evidence also showed that respondents all had the great bulk of their business in other areas and in products other than frozen pies, and that in each case, their operations returned multi-million-dollar profits on an overall basis.

The evidence further showed the petitioner was engaged in the pie business only, and that it did not have profits from the sale of other products or from sales in other geographic areas with which to wage a price war in the area where it sold frozen pies.

This evidence alone supported the jury's reasonable (and well-nigh inescapable) conclusion that respondents' discriminatory pricing policies in petitioner's trading area were reasonably likely to substantially lessen competition or to tend to create a monopoly.

The decision of the Court of Appeals to the contrary conflicts with this Court's decision in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119. There, this Court said:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. . . . [T]he beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. . . . The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars."

Here, the effect of respondents' localized price-cutting can be seen in its impact upon competitors other than petitioner. The Court of Appeals, in support of its conclusion that the frozen pie business was highly competitive, noted that there were over 200 manufacturers of frozen pies in the United States, and that over 30 brands were sold in Washington, Oregon, Utah, Arizona and Colorado (App. A, pp. 6-8).

However, as Pet's Exhibit PA-27 shows, respondents were able to identify only 19 brands advertised at retail in Salt Lake City in the calendar years 1957 through 1961. Of these brands, 9 were packed by either petitioner or respondents (D. Ex. PA-27). Of the remaining 10 identified brands, only 4 were advertised in both 1960 and 1961 (Id.). This almost total exclusion of competition from Salt Lake City is hard to explain on the basis of geographical factors. Petitioner had the only frozen pie

plant in the intermountain area, to be sure, but respondents managed to blanket the United States with their frozen pies from a maximum of three pie plants each. The obvious inference is that petitioner remained in the Salt Lake Market only because it had to remain, and that respondents sold in that market at the low price level which their price discriminations had created for ulterior and monopolistic motives.

The Court of Appeals' conclusion that respondents' regional price-cutting could not reasonably be expected to adversely affect competition is, on these facts, a legal holding which must necessarily have serious adverse precedential effect on future enforcement of the antitrust laws.

2. Respondents' Intent to Injure Petitioner Would Create a Reasonable Likelihood That Their Discriminations Would Adversely Affect Competition.

In holding that there was no reasonable possibility that any respondent's price discriminations would substantially lessen competition or tend to create a monopoly, the Court of Appeals disregarded significant evidence of respondents' intent. It thus has brought itself into conflict with this Court's recent decision in *Brown Shoe Co. v. United States*, 370 U.S. 294, 329, considering the significance of "intent" in evaluating probable future competitive effect of a challenged trade practice. The Court of Appeals' opinion probably also conflicts, on this point, with *Alles Corp. v. Senco Products, Inc.*, 329 F.2d 567, 572 (6th Cir. 1964) and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964).

3. The Court of Appeals Ignored the Significance of Pet's Industrial Espionage.

The incident in which Pet sent the General Manager of its Frozen Foods Division through petitioner's plant disguised as a "frozen food broker from the Northwest" has been described above. The Court of Appeals passed the incident off as ". . . reprehensible and . . . not to be condoned" (App. A, p. 30).

Decisions in other circuits hold that an inference of predatory intent may be drawn from evidence of industrial espionage. See *American Tobacco Co. v. United States,* 147 F.2d 93, 113 (6 Cir. 1944) (affirmed 328 U.S. 78); *United States v. General Electric Co.,* 82 F.Supp. 753, 901 (D. N. J. 1949).

The Tenth Circuit has clearly rejected this well-considered rule. Its decision on the point creates a conflict in the Circuits.

4. Pet's Contract With Safeway Was a Cloak Not Only for a Two-Price System in a Single Market But Also for a Geographic Price Discrimination.

The Court of Appeals has treated the discrimination inherent in the Pet-Safeway contract like the discrimination charged in *Borden Co. v. F.T.C.,* 339 F.2d 133 (5 Cir. 1964), cert. granted —— U.S. ——, docket No. 106. In *Borden,* the question revolves around the market effect of a two-price system whereby Borden sold private brands at substantially lower prices than its "Borden" brand *in the same geographic market area.* In treating the Pet-Safeway contract in the same manner, the Court of Appeals ignored the important economic-factual distinction upon which petitioner's claim is based.

Since it was stipulated that all of the products in the case (except Pet's lightweight, 20 oz. "Swiss Miss") were of "like grade and quality," petitioner showed discrimination as between Pet's low price for the Safeway "Bel Air" private label in the areas in which petitioner did business and its high price for the "Pet-Ritz" proprietary brand *in other areas.*

The economic-factual distinction between the two situations is basically this: Where a manufacturer is selling both its proprietary label and a low-priced private label side by side, he is in effect competing with himself, and will hesitate to press this competition too vigorously. But where the private label is sold in one market and the proprietary label in another, the seller need feel no such inhibition. By maintaining a high price for its proprietary brand in one location, the seller makes profits to subsidize predatory low-price selling in another area under the private label. That, as petitioner's evidence shows, is what respondent Pet did here.

This Court may decide to legalize such pricing practices in *Borden* by finding that identical goods sold under different labels are not of "like grade and quality" and that their prices may thus not be compared under the Robinson-Patman Act. But such a holding could not in any way affect this case, in which it has been established by stipulation that Pet's "Pet-Ritz" and "Bel Air" pies *are* of like grade and quality.

5. The Court of Appeals Ignored Injurious Aspects of the Pet-Safeway Private Label Contract Which It Should Have Considered.

The Court of Appeals held that Pet's substantial sales to Safeway for resale in petitioner's trading area were irrelevant to petitioner's claims under Section 2(a) of the Robinson-Patman Act because petitioner would under no circumstances have been able to obtain the Safeway business for itself, and therefore lost no sales (See App. A, p. 61). This view of the "private brand" problem ignores at least two significant competitive impacts which Pet's discriminatory Safeway contract probably had—a general lowering of the price level throughout the market, and a general strengthening of Safeway's very substantial market position.

There are, indeed, Circuit court opinions which focus upon the diversion of customers from one seller to another as the injury most likely to result from price discrimination (See e.g. *Samuel H. Moss, Inc. v. FTC,* 148 F.2d 378 (2d Cir. 1945) and *Anheuser-Busch, Inc. v. FTC,* 289 F.2d 835 (7th Cir. 1961). But these cases surely do not hold that the only possible injury of which petitioner here may properly complain is diversion of business to Pet.

This Court should make it clear that the price-depressing effects of a regional price discrimination form the basis of both a finding of potential injury to competition and of damages for a private litigant.

6. The Court of Appeals Undertook to Examine Pet's "Cost Justification" De Novo.

The Court of Appeals has held *as a matter of law,* that respondent Pet has proved "cost justification" for its

regional price discriminations involving the Bel Air label (App. A, p. 61). The Court of Appeals reached this conclusion in spite of the rule that Pet was charged with the burden of proof on the point (see *United States v. Borden Co.*, 370 U.S. 460) and the jury presumably found against Pet on the issue.

Proof of cost justification requires much more thorough and convincing evidence than Pet adduced, even if Pet's evidence were required to be believed. See *Automatic Canteen Co. v. FTC*, 346 U.S. 61; *United States v. Borden Co.*, 370 U.S. 460.

There is serious question as to whether the "cost justification" defense could ever be resolved in favor of a defendant as a matter of law, since the evidence of cost justification necessarily comes from the defendant, and the burden is on the defendant to prove it.

7. The Inferences Which the Court of Appeals Drew From Post-Complaint Evidence Would Eliminate Private Treble-Damage Actions Under the Section 2(a) of the Robinson-Patman Act, and All Other "Incipiency" Sections of the Clayton Act.

In concluding that defendants' pre-complaint conduct could not have had the reasonably probable effect of substantially lessening future competition or tending to create a monopoly, the Court of Appeals relied upon its analysis of post-complaint market conditions in 1962 (App. A, pp. 59-60). The Salt Lake City market shares of Carnation and Continental did, apparently, temporarily decrease after the complaint was filed in September, 1961. From this fact, the Court of Appeals inferred that defendants' pre-complaint conduct could not have had the potential

anti-competitive effect proscribed by Section 2(a) of the Robinson-Patman Act.

But defendants' conduct after the filing of the complaint in this case was almost certainly conditioned by the very existence of the lawsuit. Petitioner's counsel urged the jury to draw the inference that respondents had restricted their discriminatory price-cutting in response to the complaint (Tr. 1129). It is fairly inferable that they did.

The interpretation of post-complaint evidence adopted by the Court of Appeals would seem to present a complete defense for any defendant in any private action brought under either Section 2 or Section 3 of the Clayton Act. Each of those Sections is an "incipiency" statute, requiring an analysis of what "may be" the competitive effect of the discrimination (Section 2), or of the exclusive dealing or tie-in provision (Section 3).

If what "may be" the effect of wrongful conduct *when perpetrated* is to be judged by the wrongdoer's conduct after he is sued, the private remedy for past damages will be eliminated whenever the wrongdoer ameliorates his conduct before judgment. This result conflicts with the opinion of Wyzanski, J. in *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F.Supp. 125 at p. 143, injunction stricken on other grounds, 284 F.2d 582 (1st Cir. 1960). Cf. *Anderson v. Shipowners Association*, 31 F.2d 539 (9th Cir. 1929).

8. The Court of Appeals Usurped the Jury's Function by Ruling Out, as Legally Impermissible, Inferences Held Allowable in Other Circuits.

a. The Court of Appeals' Holding That Petitioner's 1958 Market Share "Approached If in Fact It Did Not Amount to a Monopoly" Conflicts With Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957).

Petitioner submitted to the jury damage studies based in part upon petitioner's 1958 market share. The Court of Appeals said:

> "... a contention that Utah Pie was entitled to hold the extraordinary market share of 66.5, attained in 1958, falls of its own dead weight. To approve such a contention would be to hold that Utah Pie was entitled to maintain a position which approached, if it did not in fact amount to a monopoly, and could not exist in the face of proper and healthy competition" (App. A, p. 69).

In fact, petitioner's 1958 market share *did* exist "in the face of proper and healthy competition." It was not until respondents embarked upon their course of discriminatory price-cutting that petitioner's market share began to decline.

Respondents' own economics expert testified that he "would expect" petitioner to have most of the business around its plant (Tr. 1035). He also testified that he would not find it surprising if petitioner had no sales whatever in the vicinity of respondents' plants, all of which were located hundreds of miles away.[2]

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[2]Respondent Pet's nearest plants were in Fresno, California, and Frankfort, Michigan. Respondent Continental's nearest plants were in Webster City, Iowa, and Watsonville, California. Respondent Carnation's plant was in Los Angeles, California.

The Tenth Circuit's assessment of "near-monopoly" based upon the local market share of the only local producer is in flat conflict with the decision of the Fourth Circuit in *Maryland Baking Co. v. FTC*, 243 F.2d 716 (1957). There, the record showed that Maryland Baking had charged discriminatory prices in the marketing area of a small competitor with the result that the small competitor's market share had fallen from 91.3% to 58.2% (See FTC Docket No. 6327, 52 FTC 1679, 1682 (1956)). The Fourth Circuit said:

> "There is evidence that the price cut was initiated for the purpose of driving the competitor out of business and that it deprived the competitor of . . . about half of its business in the product in question. The contention that petitioner's actions did not affect competition . . . is so lacking in merit as not to warrant discussion" (243 F.2d at 718).

The Fourth Circuit held that a decline from 91.3% to 58.2% market share hurt competition. The Tenth Circuit held that a drop from 66.5% to 45% could not. The conflict should be resolved.

b. The Court of Appeals Accepted the Testimony of Two Defense Witnesses, Apparently on the Theory That It Was "Uncontradicted", in Conflict With the Second Circuit Rule.

In discussing Pet's industrial espionage report on petitioner, the Court of Appeals reviewed the evidence as follows: ". . . the information contained in Dittman's report was never conveyed to Safeway personnel. Dittman so testified and so did Young, Safeway's buyer. *It thus appears that the Dittman report was never used in*

its competitive efforts with Utah Pie." (App. A, p. 30; emphasis added).

Dittman was a Pet officer and an interested witness. This Court has held that an interested witness may be disbelieved. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401.

But Young was an employe of a third party, the customer of both petitioner and respondent Pet. His credibility was a major issue in the case; Pet's attorney began his summation as follows:

> "In my 30 years of law practice, I have never had one of my witnesses accused of being a liar. Three of my witnesses were accused by the opposition of being a liar—the head buyer for the Safeway Stores . . ." (Tr. 1193).

Unless the Tenth Circuit had rejected the Second Circuit rule, it could not have relied upon Young's testimony. The Second Circuit rule is that even an uncontradicted witness may be disbelieved. See *Dyer v. MacDougall*, 201 F. 2d 265 (2d Circ. 1952). Since the Tenth Circuit purported to give petitioner the benefit of all the doubts on the evidence, it has held, in effect, that it was compelled to believe a witness even though petitioner urged the jury to conclude that the witness was lying.

9. If Continental's Denver Discriminations Were Not Before the Jury, There Should Be a New Trial, Not Judgment for Continental.

Petitioner introduced a great deal of evidence on Continental's Denver discriminations (Tr. 488-499; Pl.-Exs. 77-80, 86). The Denver discriminations were argued to the

jury (Tr. 1133, 1165). The jury found that each respondent, including Continental, had "... individually and independently discriminated in the prices *in the Utah trading area* ..." (Tr. 1283, 1284; emphasis added). The Court of Appeals construed the instructions as not permitting the jury to find that the "Utah trading area" included Denver (App. A, p. 65). It then ordered the case remanded and judgment entered for Continental (App. B, p. 89).

The Court of Appeals' disposition of this issue without ordering a new trial would seem to conflict with the decision of this Court in *Weade v. Dichman, Wright & Pugh*, 337 U.S. 801.

10. The Action of the Court Below in Reversing the Jury Verdict and Judgment in Favor of Petitioners Violates the Rule That Resolution of Questions of Fact Are for the Trier of Fact and Not an Appellate Court.

Respondents were entitled to a reversal of the judgment entered upon the jury verdict in the Trial Court only if not supported by substantial evidence, giving to petitioners the benefit of all conflicts in the evidence and all the presumptions and inferences that could reasonably be drawn from the evidence, considered in the light most favorable to petitioners. *Gunning v. Cooley*, 281 U.S. 90 (1930).

The action of the Trial Court in reversing a jury verdict, in effect, deprived petitioners of a trial by jury contrary to the Seventh Amendment of the Constitution.

Appellate Courts are not to search the record to take cases away from the jury. *Tennant v. Peoria & P. U. Ry.*

Co., 321 U.S. 29 (1943); *Ellis v. Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

As stated in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943) by Mr. Justice Murphy:

> ". . . The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury; it is for the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions, that which it considers most reasonable . . ."

The right of the jury to select from conflicting inferences and conclusions that which it considers most reasonable is a right which cannot be ignored, whether it relates to causation, impact, damages or any other issue which is in conflict. *Tennant v. Peoria & P. U. Ry. Co., supra* at 321 U.S. 35; *Sentilles v. Inter-Caribbean Shiping Corp.*, 361 U.S. 107 (1959).

In *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407 (1953) this Court stated:

> "The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury."

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari ought to be granted.

Dated, August 23, 1965.

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(Appendices A, B and C Follow)

Appendix A

United States Court of Appeals
Tenth Circuit

May Term - 1965

Continental Baking Company, a Delaware corporation, Appellant, vs. Utah Pie Company, a Utah corporation, Appellee.	No. 7306
Carnation Company, a Delaware corporation, Appellant, vs. Utah Pie Company, a Utah corporation, Appellee.	No. 7308
Pet Milk Company, a Delaware corporation, Appellant, vs. Utah Pie Company, a Utah corporation, Appellee.	No. 7309

Appeals from the United States District Court for the District of Utah

OPINION

Before MURRAH, PHILLIPS and LEWIS, Circuit Judges.

PHILLIPS, Circuit Judge.

Utah Pie Company[1] brought this action against Continental Baking Company,[2] Carnation Company,[3] and Pet

[1]Hereinafter called Utah Pie.
[2]Hereinafter called Continental.
[3]Hereinafter called Carnation.

Milk Company[4] under Title 15 U.S.C. (1958 Ed.) §§15 and 26.

The complaint charged that Continental, Carnation and Pet entered into a combination and conspiracy to restrain interstate commerce and monopolize such commerce in violation of §§1 and 2 of the Sherman Act (15 U.S.C.A. §§1 and 2), to be effected by destroying the competition of Utah Pie through the weakening of its capital structure and the destruction of its profits, and to violate §2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C.A. §13(a)), by price discriminations in the State of Utah, effected by selling their frozen pies at prices "below cost" in the State of Utah and at lower prices in such state than they charged for their frozen pies "in other western states."[5]

The case came on for trial in February, 1963. At the close of the evidence, each defendant properly moved for a directed verdict in its favor on the §2(a) claims asserted by Utah Pie. Each motion was denied.

The jury returned a verdict in favor of the defendants on the conspiracy claim and a verdict against each de-

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[4]Hereinafter called Pet.

[5]Throughout the proceedings Utah Pie shifted from theory to theory as to the basis for its claims of §2(a) violations. In the complaint, the theory was lower prices in Utah than in other western states; at the pretrial, it was lower prices in six western states and higher prices in "another area"; at the trial, it apparently was lower prices in the Salt Lake City market (which we will hereafter define) and higher prices in the Los Angeles market; and the injunctive decree was apparently based on lower prices in five western states and higher prices in the entire State of California. Moreover, in Utah Pie's brief in No. 7308, Utah Pie relies on lower prices in five western states and higher prices in northern California.

fendant on Utah Pie's §2(a) claims. Each defendant, in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, made a timely and proper motion to set aside the verdict against it and enter judgment n.o.v in its favor on Utah Pie's §2(a) claims. Each motion was denied.

The jury also returned a verdict in favor of Continental on a counterclaim asserted by it, charging a §2(a) violation by Utah Pie. On Utah Pie's n.o.v. motion, the court set aside that verdict and entered judgment on the counterclaim in favor of Utah Pie, notwithstanding it had not moved for a directed verdict in its favor on the counterclaim.

On February 23, 1963, a judgment was entered for Utah Pie against each defendant for treble the amount of the verdict against it, and permanently enjoining each of the defendants from violating §2(a). Appeals from each of such judgments have been taken. The injunction portion of the judgment was stayed by this court, by order entered March 21, 1963.

The §2(a) claims and the conspiracy claim were tried at the same time and the evidence in support of them was commingled. Certain facts, if set out and considered in isolation, would present a distorted picture of these cases. To get a true perspective of them, the whole factual picture and the relation of each of the facts to each other must be brought into proper focus and considered together.

In each appeal, except Continental's appeal from the judgment in favor of Utah Pie on Continental's counter-

claim, there is set up as a ground for reversal that the evidence was insufficient to support the verdict in favor of Utah Pie, or warrant the injunction. Since we conclude the judgments in favor of Utah Pie must be reversed on that ground, we shall not consider the other grounds urged for reversal.

Many of the facts relating to the §2(a) claims are pertinent in all of the appeals, and we will undertake to set out a portion of such facts in a general statement of facts. We will then set out separately the facts particularly applicable in each of the respective appeals.

I

General Statement of Facts

The evidence in these cases covers the period 1958 to 1961, both inclusive. It is free from substantial dispute, except for a few statements of opinions or conclusions not based on any substantial underlying proof.

The offering prices, selling prices, sales volumes, percentages of market shares, earnings, and other like matters; the tables and charts which appear in this opinion; and the appendices annexed hereto are all based on uncontroverted documentary evidence, some of which was introduced by the plaintiff and some by the defendants.

The phrase "frozen fruit pies" is sometimes used in the frozen pie industry in a broad sense and as including frozen apple, cherry, boysenberry, peach, pumpkin and mince pies, although the latter two are not, strictly speak-

ing, fruit pies. In its broad sense, the phrase does not embrace frozen cream pies, such as lemon cream, chocolate cream, cocoanut cream, and the like.

The frozen pies involved in these appeals are those embraced in the phrase "frozen fruit pies" in its broad sense.[6] We will hereafter refer to them simply as "frozen pies."

The phrase "frozen fruit pies" is also used in a more narrow sense, as embracing only the strictly fruit pies, and not including mince, pumpkin, or the cream pies. Frozen fruit pies in that narrow sense will be referred to hereinafter as "frozen fruit pies."

Utah Pie, a Utah corporation, owned and operated by the Rigby family, was in the fresh pie business for nearly 30 years prior to 1957. It marketed its fresh pies in Salt Lake City and other points in Utah, in Las Vegas, Nevada, Grand Junction, Colorado, Farmington, New Mexico, Evanston, Wyoming, and at one other city in Nevada.

Faced with a declining volume and a substantial loss in its fiscal year ended October 31, 1957, Utah Pie, in the latter part of that year, entered into the frozen pie business.

It had much of the facilities needed for the frozen pie business in its old plant. It opened a new plant in 1958, which had a capacity, at least by 1961, on a three-shift basis, of 40,000 frozen pies a day, or about one and one-half million cases of frozen pies per year. There are six

[6]It was stipulated that the only frozen fruit pies involved in these cases were frozen apple, cherry, peach, boysenberry, mince and pumpkin.

pies in a case. It had adequate refrigeration for fruit, production facilities, and storage of frozen pies. Its frozen pie business was well managed and its sales and transportation costs were low. It had the only frozen pie plant located in the Salt Lake City market, which enabled it to deliver to its customers frozen pies in small quantities.

The frozen pie business is comparatively new and highly competitive.

The six western states of California, Washington, Oregon, Utah, Arizona and Colorado embrace a portion of the Inter-Rocky Mountain and West Coast regions. In each of such states there are one or more separate and distinct frozen pie market areas, which comprise a large metropolitan center and the territory closely adjacent thereto. There are distinct frozen pie market areas in Los Angeles, San Francisco, Seattle, Portland, Spokane, Salt Lake City, Phoenix and Denver. The periphery of each of such market areas is nearly the same as that of the area in which its metropolitan newspapers circulate, that, because retail advertising is the lifeblood of the frozen pie industry and crucial to volume sales. The current retail price in a particular market area at a particular time is generally fixed by the prices at which the chain stores and cooperative grocery organizations advertise their frozen pies in the Thursday and Friday editions of the local newspapers, published and circulated in that market area.

During the period 1958 to 1961, inclusive, retailers of frozen pies in the Salt Lake City market advertised Utah Pie's brands a great many more times than they did

brands of each of the other manufacturers selling in that market.[7]

The manufacturers and distributors of national brands, who sell throughout the United States, the manufacturers and distributors of regional brands, who sell in several of such local market areas, and sometimes a local manufacturer and distributor, whose single plant is located in a particular market area where his principal business is done, but who also may sell in other market areas in the same region, usually make up the group competing in a local market area. More than 30 different brands are sold in the six western states referred to above, and the num-

[7]The following is a tabulation of frozen pie advertisements, which appeared in the Salt Lake City newspapers from 1958 through 1961.

Brand	1958		1959		1960		1961	
	No. Ads	% of Total	No. Ads	% of Total	No. Ads	% of Total	No. Ads	% of Total
Utah	27	19.9	26	26.8	37	28.0	47	27.8
Frost 'N' Flame	0	0	4	4.1	22	16.7	25	14.8
Mayfresh	0	0	0	0	0	0	4	2.4
TOTAL UTAH PIE	27	19.9	30	30.9	59	44.7	76	45.0
Pet Ritz	26	19.1	13	13.4	2	1.5	0	0
Swiss Miss	0	0	0	0	6	4.5	10	5.9
TOTAL PET	26	19.1	13	13.4	8	6.0	10	5.9
Carnation (Simple Simon)	19	14.0	8	8.3	14	10.6	4	2.4
Continental (Morton)	0	0	3	3.1	1	.8	5	2.9
Bel-air	0	0	7	7.2	14	10.6	12	7.1
Others	64	47.0	36	37.1	36	27.3	62	36.7
TOTAL	136	100.0	97	100.0	132	100.0	169	100.0

ber of nation-wide manufacturers of frozen pies is over 200.

The brands, or labels, used by the parties to these appeals were as follows:

Utah Pie	"Utah," "Frost 'N' Flame," "Mayfresh," and "Sonny Boy";
Carnation	"Simple Simon";
Continental	"Morton's";
Pet	"Pet Ritz" and "Swiss Miss."

Utah Pie and Pet also manufactured frozen pies for Safeway Stores, Inc.,[8] under the latter's label, "Bel-air."

The price in a particular market area depends on the number and identity of the competing manufacturers, the competitive factors in such market, and the extent of the thrust or pressure of such factors at a particular time. A local manufacturer and seller, with his plant located in a particular market area, because of his low distribution and selling costs, preferences normally given to a local business, and his ability to sell and distribute frozen pies in either large or small quantities, is in a position to assert a very substantial competitive thrust and pressure, not present where there is no local manufacturer and seller competing in the area. Another competitive factor, which affects some local market area prices is the presence of private or controlled brands of frozen pies, which are usually sold by large retail chains and members of cooperative grocery organizations, and are pur-

[8]Safeway Stores, Inc., with its headquarters in Oakland, California, owns and operates 1,852 food stores in 27 states and the District of Columbia, extending from the East Coast to the West Coast of the United States.

chased by them in large quantities at preferential prices. A controlled label is owned by the manufacturer, but sold to only one buyer in a particular market. A private brand is owned by the buyer and may be manufactured by one or more suppliers.

Because the competitive thrusts and pressures in a particular market area differ substantially from those at a given time in other market areas and change from time to time in the several market areas, the prices in each market area change from time to time independently of price changes in other market areas. Hence, the prices in the several market areas in such Intermountain and West Coast regions have little, if any, relation to each other and are not uniform. They vary from time to time and from market area to market area.

The Salt Lake City market area[9] comprises most of the State of Utah, southern Idaho, and small areas adjacent to Utah in the States of Wyoming, Colorado and Nevada. That market developed its own competitive pattern. No brand seemed to enjoy a consumer's loyalty, with the possible exception of Utah Pie's Utah brand. Pies were purchased primarily on a price basis. The prevailing retail price was fixed by the advertised week end specials appearing in the local newspaper advertisements of the grocers on Thursday and Friday.

In the first part of 1958, Utah Pie marketed its frozen pies in Utah and Idaho. It gradually extended its sales to other areas, so that by 1961 it was selling frozen pies in Utah, Idaho, Washington, Colorado and Wyoming. However, its sales outside of Utah and southern Idaho

[9]Hereinafter referred to as the "Salt Lake City market."

during the period involved in this law suit, 1958 to 1961, were negligible. See Appendix I attached hereto.

Utah Pie entered the field, as stated above, late in 1957, at least two years after Carnation, Continental and other manufacturers had introduced frozen fruit pies in the Salt Lake City market. Throughout the period here involved, Utah Pie's competitive emphasis was on price and except for a comparatively few instances, hereinafter noted, it sold its frozen pies at prices below those of its competitors.

In 1958, Utah Pie sold 75,939 cases[10] of frozen pies; in 1959, 76,744 cases; in 1960, 167,788 cases; and in 1961, 205,380 cases. During those four years its volume increased 270.5 per cent and its dollar volume in sales of frozen pies increased from $139,306.24 in the fiscal year ended October 31, 1958, to $407,841.25 in the fiscal year ended October 31, 1961, an increase of 292.8 per cent. Salaries paid the Rigby family engaged in the business increased by approximately $30,000 during those four years and net income before taxes, as adjusted, went from a loss of $1,264.51 in fiscal 1958 to a profit in fiscal 1961, before taxes, of $30,597.10. After taxes, it was $19,643.04, which was 28.5 per cent of its net worth.

In 1958, Utah Pie captured 66.5 per cent of the market. In 1959, while its volume increased, its share of the rapidly expanding market decreased to 34.3 per cent. In 1960, its sales volume more than doubled and its market share went up to 45.5 per cent. In 1961, its sales volume very substantially increased, as shown above, and its market share held at 45.3 per cent.

[10]There are six pies in a case.

During the entire period involved in these cases, Utah Pie's sales volume and dollar sales substantially increased as did its profits except in 1958, and it enjoyed a very large percentage of the total sales volume in the Salt Lake City market, which percentage stabilized at about 45 per cent the last two years of the period. Throughout such period it was continuously a financially strong business concern and a healthy and effective competitor in the Salt Lake City market.

Utah Pie's phenomenal increase in sales of frozen fruit pies, an increase of 270.5 per cent in four years, came notwithstanding its sales efforts were almost minimal. Utah had but one salesman in the nine states in which it attempted to sell frozen fruit pies during the years 1958 to 1961. This salesman made only isolated trips to cities outside Utah Pie's immediate trading area, the Salt Lake City market. The company maintained no permanent sales force in such cities as Spokane, Seattle and Denver. It once had a broker in Portland, but apparently for only a short time. It made an effort to secure the account of Miller's Supermarket in Denver, but the Utah Pie salesman was told he would have to contact the chain's office in Chicago. No contact was ever made. The amounts spent on advertising during the years 1957 to 1961, inclusive, were comparatively small, and were as follows:

In fiscal	1957	$ 432.21
	1958	3,431.71
	1959	3,180.29
	1960	7,160.63
	1961	1,226.01

As will appear from the table which follows, the demand for frozen pies in the Salt Lake City market rapidly increased during the period 1958 to 1961, inclusive.

The following table is a composite picture of the total sales volume and the percentage of market shares of each party hereto and the other competitors in the Salt Lake City market in the years 1958 to 1961, inclusive.

1958 (Volume in dozens)

Company	Volume	% of Market
Carnation	5,863	10.3
Morton	754	1.3
Utah Pie	37,969.5	66.5
Pet	9,336.5	16.4
Others	3,137	5.5
Totals	57,060	100.0

1959

Company	Volume	% of Market
Carnation	9,625	8.6
Morton	3,182	2.9
Utah Pie	38,372	34.3
Pet	39,639	35.5
Others	20,911	18.7
Totals	111,729	100.0

1960

Company	Volume	% of Market
Carnation	22,371.5	12.1
Morton	3,350	1.8
Utah Pie	83,894	45.5
Pet	51,480	27.9
Others	23,473.5	12.7
Totals	184,569	100.0

1961

Company	Volume	% of Market
Carnation	20,067	8.8
Morton	18,799.5	8.3
Utah Pie	102,690	45.3
Pet	66,786	29.4
Others	18,565.5	8.2
Totals	226,908	100.0

Many frozen pie manufacturers gave rebates from their list of offering prices in the form of advertising allowances for stated periods, upon proof of advertising by the purchaser on tear sheets furnished to the purchaser for that purpose. There was no requirement as to size of advertisement, and the advertisement needed only to be run one time to qualify the purchaser for an allowance. The dollar amount of the allowance was not determined by the quantity of frozen pies purchased, nor by the size or frequency of the advertisement, and the small purchaser who advertised received the same allowance per case as the large purchaser. In effect, the advertising allowance is a discount and fixes the net per case price of the pies purchased.

We now turn to separate statements of the facts particularly applicable in each appeal. However, from time to time in each of such statements, facts will appear which obviously have general application in the other two appeals, but which we think can be better stated in the context of the statement wherein they appear.

II

No. 7309

Factual Statement in the Pet Appeal

Pet is a corporation engaged in the manufacture and sale of food products, including frozen pies. Its main office is in St. Louis, Missouri. Its frozen pie manufacturing plants are located in Frankfort, Michigan, Chambersburg, Pennsylvania, and Fresno, California.

Pet sells and distributes its pies from its three plants throughout the United States. From 1958 to 1962, inclusive, it was a competitor of Utah Pie in the Salt Lake City market. Pet entered the frozen pie business in 1955, by the acquisition of a frozen pie plant at Beulah, Michigan. Initially, its pies were made in four flavors and distributed in a relatively small north central territory, the Detroit-Chicago-Milwaukee area. In order to expand its frozen pie business nationwide, Pet moved its plant from Beulah to Frankfort, and then in 1956 acquired its plant at Fresno, and in 1957 its plant at Chambersburg. It marketed its pies under the brand, Pet-Ritz. It added new flavors and undertook to accelerate consumer acceptance and demand through an extensive advertising campaign, which emphasized the quality of its pies. This advertising included advertising in local newspapers, distribution of coupons that might be used in purchasing pies, and demonstrations in grocery stores to show how easily the pies could be prepared for consumption. It also included a large expenditure for advertising on a half-hour television program, starring Red Skelton.

Soon after Pet entered the frozen pie industry, the nature of the market began to change. As frozen pies became more and more in demand, numerous regional or local companies, such as Utah Pie, entered the business. Because of the freight advantage, which they had over the national companies, whose products usually had to be shipped into a region from a distance, the local and regional companies were able to sell at lower prices than the national companies had been charging. Emphasis in many regional markets shifted from quality to price, and

price became the principal factor of competition. With the increase of price competition, prices of frozen pies declined.

During 1957 and 1958, while prices were declining and the market was expanding, Pet's sales of frozen pies did not keep pace with the expanding market. In the Salt Lake City market, total sales in 1959 were 1.96 times total sales in 1958, while sales of Pet-Ritz pies were 1.52 times sales in 1958; total sales in 1960 were 1.64 times total sales in 1959, while Pet-Ritz sales were 0.58 times sales in 1959; and total sales in 1961 were 1.24 times total sales in 1960, while Pet-Ritz sales were 0.46 times sales in 1960.

During the period 1958 to 1961, inclusive, the total sales of Pet-Ritz pies were the following percentages of all brands of frozen fruit pies sold in the Salt Lake City market: 1958—16.4 per cent; 1959—12.7 per cent; 1960—4.5 per cent; 1961—1.7 per cent. The decrease was due to the fact that other brands were being sold below the Pet-Ritz price in that market.

When Pet realized that advertising efforts were not enough to check its continuing decrease in sales, it made William N. Harsha, who had been the managing director of Pet's Canadian corporation, general manager of the Pet-Ritz Frozen Foods Division. It assigned him to different divisions of Pet to study its operations and financial and production problems. After a review and study of Pet's operations, Harsha decided to curtail the advertising and effect economies by eliminating duplication in overhead, increasing processing efficiency, improving production methods, reducing warehousing costs, and re-

ducing freight costs by better scheduling of deliveries. Pet also decided to make an analysis of the frozen pie market to determine what kind of pie the housewife preferred. It was then known that the housewife was price conscious, but Pet, having spent large sums in advertising the Pet-Ritz brand as a quality product, did not want to reduce the quality of that pie to enable it to compete with lower-priced pies. As part of the effort to analyze the market, a research director was employed, who began his studies in June, 1959. Soon thereafter, the Market Research Corporation of America was engaged to make a study to help Pet decide whether or not to add a smaller and lighter economy brand of frozen pies. The result of these studies indicated that there was a market for a frozen economy pie and Pet introduced its Swiss Miss pie in Denver in April, 1960, and elsewhere in the United States, including Utah, in August, 1960. Swiss Miss is an eight-inch, 20-ounce pie. Utah Pie's brands are all eight-inch, 24-ounce pies. While it did not fully meet the price competition, it enabled Pet to compete more effectively, improved the profit picture of the frozen foods operation, and restored some of Pet's distribution with major chains.

In addition to adding the lighter-weight, lower-priced Swiss Miss to its line of fruit pies to improve its competitive position, Pet also entered into negotiations with Safeway Stores, Inc., for the production for it of frozen fruit pies under the Bel-air label. It sold Safeway 25,462.5 dozen Bel-air frozen fruit pies in 1959, and in December of that year secured a contract to supply Safeway with Bel-air frozen fruit pies during 1960. Under

this contract, Safeway agreed to purchase not less than 500,000 dozen and not more than 1,000,000 dozen frozen fruit pies in 1960, and Pet agreed to manufacture and deliver such pies to Safeway.[11] The minimum quantity was stipulated, because Pet had to buy new equipment to handle the added production, and assurance of a minimum purchase was needed to compensate for the cost of the equipment.

Exhibits introduced by Utah Pie reflect cost studies made of Bel-air frozen pies sold by Pet to Safeway. They show Pet's costs of manufacture, sale and delivery of such pies were $0.4980 less than such costs of like pies sold under its regular labels, and that the difference in price to Safeway of such Bel-air pies and the price such like pies sold to other customers was only $0.4275. The difference in cost justified the difference in price under the cost justification proviso in §2(a) of the Clayton Act (15 U.S.C. §13(a)).

Safeway regularly followed the practice of requiring the sellers of its frozen pies to justify any reduction in price to it by a showing of cost difference. It did so with respect to the sales of Bel-air pies to it by Pet, under the December, 1959 contract, by an express provision therein so requiring.

Simultaneously with such efforts to cut costs and improve volume of sales, Pet, in 1958, began to reduce its advertising expenditures for frozen pies. From $866,116

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[11]Under such contract, Pet was to furnish Safeway's requirements of Bel-air frozen fruit pies for all of its food stores and shipments were to be made from the Pet plant nearest the point of delivery.

in 1959, its advertising expenditures were reduced to $337,510 in fiscal 1961, and to $42,562 in fiscal 1962.[12]

By the time the present case came on for trial, Pet's frozen food division, the chief operation of which was the production of frozen fruit pies, was making a net profit.

The Pet-Ritz pies were always sold in the Salt Lake City market at prices substantially higher than the prices at which the pies of Utah Pie, all of which were of the same weight and quality as Pet-Ritz, were sold.

In August, 1960, when the first Swiss Miss apple pie was sold in the Salt Lake City market, the price thereof was $3.29 per dozen. At the same time, the larger and heavier Frost 'N' Flame apple pie of Utah Pie was sold at a price of $3.00 per dozen. Thereafter, during the period covered by this action, the Swiss Miss apple pie ranged in price from $3.24 to $3.38 per dozen, while the Frost 'N' Flame apple pie ranged in price from $2.75 to $3.10 per dozen.

Except during the periods or months hereinafter noted in this paragraph, the prices at which the Swiss Miss frozen pies were sold were always higher than the prices at which the larger and heavier Frost 'N' Flame pies were sold in the Salt Lake City market; and even in such periods or months the prices of Swiss Miss were higher than the prices of Frost 'N' Flame on an ounce-for-ounce basis; and professional buyers for resale always take into consideration differences in size and weight. In the period

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[12]On April 1, 1960, Pet changed its fiscal year for accounting purposes from the calendar year to a year ending March 31. Consequently, there is no fiscal 1960 in its accounting.

September, 1960 through November, 1961, the price of the Swiss Miss cherry pie, if difference in weight be disregarded, was lower than the price of Frost 'N' Flame cherry pie. That was true of Swiss Miss peach pie in August and October, 1960, and January, February, March, June and September, 1961, and of Swiss Miss boysenberry pie from August, 1960, through December, 1961. It was never true of Swiss Miss apple pie.

Gaylen Rigby testified for Utah Pie, as follows:

> "* * * with all of our advantages that we had, * * * we knew that we could not enter the market unless we could come up with a price that would interest the wholesalers in putting in our product. We knew we'd have to be *a few pennies under our competition* because of our locale." (Emphasis supplied.)

In January, 1958, the first date that comparative prices are shown in the record, Utah Pie's prices, instead of being a few pennies, were from 68 cents to $1.24 per dozen lower than the price of Pet-Ritz pies, the only pies Pet was then selling in the Salt Lake City market. In that month, in that market, Utah brand frozen apple pies were sold at a price of $4.15 per dozen; while Pet-Ritz frozen apple pies were sold at prices ranging from a low of $4.84 per dozen, to a high of $5.00 per dozen. During 1958, the Pet-Ritz frozen apple pies were sold at wholesale in that market at prices that were approximately $1.00 per dozen higher than the prices at which Utah brand apple pies were being sold by Utah Pie. During 1959, the difference ranged from 12 cents to 62 cents per

dozen; during 1960, from 54 cents to $1.28 per dozen; and during 1961, from 58 cents to $1.89 per dozen.

Plaintiff's Exhibit 112 reflects the price lists and special deals offered by Pet in Wyoming, Washington, Utah, Oregon, Montana, Idaho, Colorado, southern California and northern California, in 1958, 1959, 1960 and 1961. A chart annexed hereto as Appendix II analyzes month by month the lowest absolute price offered by Pet for apple pie in each of such markets. By lowest absolute price is meant the list price, less any deals offered, whether direct discounts from the invoice price or advertising allowances. [Apple pie figures are used, because it is the volume leader, sells at the lowest price of the frozen pies, and is the price indicator.]

The chart shows the following:

Pet's absolute price for apple pie was uniform in Wyoming, Utah, Montana, Idaho and Colorado from January 1958, through November, 1959; at no time during that period was Pet's price in Utah lower than its price in any of the other market areas; and during such period Pet's lowest price was always in northern California, southern California, Washington, or Oregon.

In December, 1959, Pet's Utah price was $3.80 per dozen, while its price in Wyoming, Washington, Oregon, Montana and Colorado was $4.00 per dozen, but in that some month Pet offered apple pie in northern California for $3.70 per dozen and in southern California for $3.60 per dozen.

During four months in 1960, Pet charged less for apple pie in Utah than it did in some of its other market areas,

but at all times during 1960, Pet's Utah price was higher than its price in southern California and was the same or higher than its price in northern California.

In January and February, 1961, Pet's lowest offering price for apple pie was $3.70 per dozen and was made in Utah, Montana and Colorado; in March and April, 1961, Pet's lowest offering price for apple pie was $3.56 per dozen and was made in Utah, Montana and Idaho; and from May through August, 1961, Pet's apple pie price in Utah was the same or higher than its apple pie prices in its other market areas.

Thus, in only nine of the 44 months here involved, was Pet's price for apple pie lower in Utah than in any of its other market areas, and in only four months, January, February, March and April, 1961, was Pet's price in Utah the lowest of any of its other market areas.

Furthermore, a comparison of Utah Pie's absolute apple pie prices, shown by its Exhibit 91, and set forth in a chart annexed hereto as Appendix III, and Pet's lowest absolute prices, reflected in Appendix II, shows that at no time during the 44-month period of May, 1958, through December, 1961, were Pet's Utah prices lower than Utah Pie's prices.

Pet introduced a machine tabulation of invoices of actual sales of frozen fruit pies by it to customers in seven cities in the western states, during the period from May, 1958, through December, 1961. The seven cities were selected because most of Pet's frozen fruit pies sold in the western states are sold through wholesalers in these cities.

Pet's Exhibit A-40 has particular relevancy to Utah Pie's allegation of territorial price differences, namely, that Pet charged lower prices for its frozen fruit pies in the Salt Lake City market than it charged in the market area in which its pies were made or in other western markets. It shows the lowest invoice prices at which Pet-Ritz frozen apple pies were sold in Salt Lake City and the six selected cities, and we reflect the pertinent part thereof in a chart annexed hereto as Appendix IV.

During the period covered by the tabulation (44 months in all), the lowest price at which Pet-Ritz frozen apple pies were sold by Pet to wholesalers in Salt Lake City was lower than the lowest price at which such pies were sold by Pet to wholesalers in Los Angeles, in only three months—December, 1959, March, 1961, and April, 1961. The following table lists these prices, as well as the lowest price at which Utah Pie sold frozen apple pies under its Utah brand in Salt Lake City in the same months:

Lowest Price Charged for a Dozen Frozen Apple Pies

	Pet-Ritz		Utah Pie
	Los Angeles	Salt Lake City	Salt Lake City
December, 1959	$3.90	$3.84	$3.60
March, 1961	4.26	4.24	3.10
April, 1961	4.26	4.08	3.50

During the same period, the lowest price at which Pet-Ritz frozen apple pies were sold by Pet to wholesalers in Salt Lake City was lower than the lowest price at which such pies were sold by Pet to wholesalers in San Francisco in only seven months—December, 1959, August, 1960, September, 1960, January, 1961, February, 1961,

March, 1961, and April, 1961. The following table lists the lowest prices at which Pet-Ritz pies were sold in each of the cities during these months, and the lowest price at which Utah Pie sold its 24-ounce Utah brand frozen apple pies in Salt Lake City during those months:

Lowest Price Charged for a Dozen Frozen Apple Pies

	Pet-Ritz		Utah Pie
	San Francisco	Salt Lake City	Salt Lake City
December, 1959	$4.00	$3.84	$3.60
August, 1960	4.40	4.28	3.50
September, 1960	4.40	4.28	3.16
January, 1961	4.40	4.28	3.43
February, 1961	4.40	4.28	3.50
March, 1961	4.40	4.24	3.10
April, 1961	4.48	4.08	3.50

The number of Pet-Ritz frozen apple pies sold in Salt Lake City at such lower prices is almost inconsequential. They were as follows:

December, 1959	125.0 dozen	February, 1961	27.5 dozen
August, 1960	45.0 dozen	March, 1961	27.5 dozen
September, 1960	52.5 dozen	April, 1961	25.0 dozen
January, 1961	12.5 dozen		
		Total	315.0 dozen

The introduction of the "economy" Swiss Miss pie by Pet to enable it to compete with lower-priced pies in various markets has been discussed earlier. One question with respect to that pie remains. Was it sold at lower prices in the Salt Lake City market than in California, where the pies were manufactured? Utah Pie introduced no evidence whatsoever to sustain any burden of proving lower prices for Swiss Miss pies in the Salt Lake City

market. The Swiss Miss pie was first sold in Salt Lake City in August, 1960. The present complaint was filed in September, 1961. Exhibit A-40 also shows all the actual sales of Swiss Miss pies in such seven western cities in 1960 and 1961, and we reflect the pertinent part thereof in that respect in a chart annexed hereto as Appendix V. During only one of the intervening 13 months was the lowest price at which the Swiss Miss apple pie was sold in Salt Lake City lower than the price at which the pie was sold in San Francisco and at no time was the price in Los Angeles higher than the lowest price in Salt Lake City. In addition, during this entire period, the price of the Frost 'N' Flame pie, manufactured by Utah Pie, was always lower than the price of the lighter (by four ounces) Swiss Miss pie. The following tabulation permits a comparison of the prices.

Lowest Price Per Dozen—Apple Pies

	Swiss Miss			Frost 'N' Flame
	Salt Lake City	Los Angeles	San Francisco	Salt Lake City
August, 1960	$3.29	$3.05	$3.29	$3.00
September	3.25	3.05	3.17	3.00
October	3.25	3.05	3.17	3.10
November	——*	3.05	3.05	3.10
December	——	3.05	3.29	3.10
January, 1961	3.29	3.05	——	3.10
February	3.25	3.05	——	3.10
March	3.25	3.05	——	3.10
April	3.25	3.05	——	3.10
May	3.25	3.05	3.29	3.10
June	3.25	3.05	3.21	2.75
July	3.29	3.05	3.29	2.75
August	——	——	3.17	2.75

*—— indicates no sales were made in the month.

Even when Utah Pie's prices for Frost 'N' Flame were down to $2.75 per dozen in July and August, 1961, it made a profit on its sales thereof.

In 1958, Utah Pie sold 37,969.5 dozen frozen pies in the Salt Lake City market, which was 66.5 per cent of the total sales volume. In 1958, Pet sold 9,336.5 dozen frozen pies in that market, which was 16.4 per cent of the total sales volume. In 1958, neither Utah Pie nor Pet sold any Bel-air pies to Safeway.

In 1959, Utah Pie sold 38,372 dozen frozen pies in that market, which was 34.3 per cent of the total sales volume. In 1959, Pet sold 39,639 dozen frozen pies in that market, which was 35.5 per cent of the total sales volume. However, in 1959, in that market, Utah Pie sold no Bel-air frozen fruit pies to Safeway and Pet sold in that year 25,462.5 dozen Bel-air frozen fruit pies to Safeway. Pet's market share, or percentage of total sales volume in that year, with frozen fruit pies sold to Safeway excluded, was 12.7 per cent.

In 1960, Utah Pie sold 83,894 dozen frozen pies in that market, which was 45.5 per cent of the total sales volume. In 1960, Pet sold 51,480 dozen frozen pies in that market, which was 27.9 per cent of the total sales volume. However, in 1960, in that market, Utah Pie sold no Bel-air frozen fruit pies to Safeway, while Pet sold 22,694 dozen Bel-air frozen fruit pies to Safeway, and Pet's market share, or percentage of the total sales volume, with the frozen fruit pies it sold to Safeway excluded, was 15.6 per cent.

In 1961, Utah Pie sold 102,690 dozen frozen pies in that market, which was 45.3 per cent of the total sales

volume. In 1961, Pet sold 66,786 dozen frozen pies in that market, which was 29.4 per cent of the total sales volume. However, in 1961, in that market, Utah Pie sold no Bel-air frozen fruit pies to Safeway, while in that year Pet sold Safeway 14,897.5 dozen frozen fruit pies, and Pet's market share or percentage of total sales volume, with the frozen fruit pies sold by it to Safeway excluded, was 22.9 per cent.

We have shown Pet's share of the market, with Bel-air frozen fruit pies excluded, in 1959, 1960, and 1961, because it was clearly established by uncontradicted and uncontroverted evidence that Safeway was not willing in those years to purchase frozen fruit pies from Utah Pie, for the reason that it was unable to persuade Utah Pie to install means and procedures that would insure uniform quality of Bel-air frozen fruit pies produced by Utah Pie and sold by it to Safeway. In other words, Safeway imposed as a condition to its purchase of any Bel-air frozen fruit pies from Utah Pie that such installations be made by Utah Pie. The primary reason Safeway imposed such conditions was that it was unwilling to risk damage to the fine reputation it was building up for Bel-air frozen fruit pies by the maintenance of a constant high quality of such pies, through the unwitting sale by it of Bel-air pies, the quality of which fell below such high standard of quality. Other reasons are set forth in subjoined note 13. It follows that Pet's sales of Bel-air

[13] In 1960, Safeway discovered that the Bel-air frozen pumpkin pies being furnished it by Utah Pie were below the quality the latter had agreed to maintain, both as to excess moisture content of pumpkin pies and the nonconformity of ingredients to stipulated formulas for both pumpkin and mince pies, and notwith-

frozen fruit pies to Safeway in 1959, 1960, and 1961 took no frozen fruit pie business away from Utah Pie. If Pet had not sold the Bel-air frozen fruit pies to Safeway in those years, the latter would have purchased them from some other manufacturer than Utah Pie, who was willing to meet Safeway's manufacturing conditions and requirements.[14]

In 1958, the market share of sellers in the Salt Lake City market, other than Utah Pie's and the defendants', was 5.5 per cent, and in 1959 it increased to 18.7 per cent, a gain of 13.2 per cent. The aggregate of such 13.2 per cent and the 22.8 per cent of Pet's market share attributable to Bel-air sales in 1959 more than equals the percentage of market share decrease of Utah Pie in 1959 from 1958. Moreover, Pet's share of the market, exclusive of its sales of Bel-air pies to Safeway, was only 12.7 per cent of the total market share, in 1959, while its share in 1958 was 16.4 per cent, and that included the sales of all kinds of frozen pies. The loss Utah Pie suffered in market share in 1959 was not attributable in anywise to Pet's competition.

In 1960, Utah Pie sold 4,608.5 dozen frozen mince and 5,336.5 dozen frozen pumpkin Bel-air pies to Safeway.

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standing it had also agreed so to do, had failed to install a coding device by which Safeway could pinpoint a defective pie, even to the day of its production.

[14]While Safeway would not purchase frozen fruit pies packed under its Bel-air label from Utah Pie, for the reasons stated above, it was a large purchaser of other frozen pies from Utah Pie. Utah Pie sales of other frozen pies to Safeway were approximately 31,500 dozen in 1958, 16,500 dozen in 1959, 22,000 dozen in 1960, and 18,000 dozen in 1961.

In the years 1958 to 1961, inclusive, Pet sold no mince nor pumpkin Bel-air pies to Safeway.

In 1961, Safeway requested Utah Pie to pack its Bel-air mince pies in a new carton. Utah Pie advised Safeway it would not do so, unless it was given Safeway's frozen fruit pie business, then going to Pet. That Safeway would not do. As a result, Safeway only purchased 50 dozen frozen mince pies from Utah Pie in 1961, just enough to let Utah Pie use up the old cartons and shipping cases it had on hand, but it purchased 6,483 dozen Bel-air frozen pumpkin pies from Utah Pie in that year. This further shows that Utah Pie's failure to sell frozen pies to Safeway was not due to competitors' prices, but to Utah Pie's unwillingness to meet Safeway's requirements.

Pet's market share, exclusive of Bel-air frozen fruit pies sold to Safeway, increased in 1961 over 1960, 7.3 per cent, but uncontroverted facts show that gain did not result from a loss by Utah Pie. In 1960, Utah Pie sold 4,608.5 dozen Bel-air mince pies to Safeway. Due to its unwillingness to use the new type carton Safeway requested, it sold Safeway only 50 dozen mince pies in 1961. It is apparent that no problems with respect to new cartons existed as to pumpkin pies, because Utah Pie sold Safeway 1,146.5 more pumpkin pies in 1961 than it did in 1960. The only reasonable inference is that had Utah Pie been willing to adopt the new carton for mince pies, it would have sold Safeway at least as many mince pies in 1961 as it did in 1960, and had it done so, its market share in 1961 would have been 46.8 per cent, instead of 45.3 per cent. In 1960, Pet's Swiss Miss sales accounted for 11.1 per cent of the total sales in the Salt Lake City market, while its Pet-Ritz sales accounted for only 4.5 per cent thereof. In 1961, Pet's Swiss Miss sales

accounted for 21.2 per cent of the total sales in such market, while its Pet-Ritz sales accounted for only 1.7 per cent thereof. Pet's increase in market share in 1961 was due solely to the increase in its sales of Swiss Miss pies, and that pie, on an ounce-for-ounce basis, was always sold at a higher price than Utah Pie's Frost 'N' Flame pie. In only one month, May, 1961, was Swiss Miss sold at a higher price in San Francisco than in Salt Lake City.

Moreover, the market share percentage of sellers in the Salt Lake City market, other than Utah Pie and the defendants, decreased 4.5 per cent and their sales volume decreased 4,902 dozen in 1961; and it is reasonable to infer that Pet's market share increase in 1961 derived from such decreases suffered by such other sellers. But in view of the fact that Utah Pie had a substantial sales volume increase in 1961 and would have had a market share percentage increase in that year, had its sales of Bel-air frozen mince pies not substantially decreased due to its refusal to adopt a new carton, it would be unreasonable to infer that Pet's gain resulted from any sales loss by Utah Pie.

The total sales volume in dozens and the percentage of market share of Utah Pie and Pet in the Salt Lake City market, with the Bel-air sales to Pet excluded, in the years 1958 to 1961, inclusive, were as follows:

	Volume of Sales		Market Share	
	Pet	Utah Pie	Pet	Utah Pie
1958	8,336.5	37,969.5	16.4	66.5
1959	14,176.5	38,372	12.7	34.3
1960	28,786	83,894	15.6	45.5
1961	41,888.5	102,960	22.9	45.3

In 1962, Utah Pie's volume increased to 129,658.3. Pet's volume and its and Utah Pie's market share percentages are not shown in the record.

Even if Bel-air sales by Pet be included in its volume, Utah Pie greatly outdistanced Pet in 1960 and 1961.

On June 23, 1960, Schenk, general manager of the Frozen Foods Division of Pet, went to the Utah Pie plant in Salt Lake City, represented that he was a frozen food broker from the Northwest, and asked to be permitted to go through the plant. Permission was granted and later Schenk prepared a report showing defects in Utah Pie's equipment and operations, to be used by D. T. Dittman of Pet in negotiating with Safeway for the latter's business in competition with Utah Pie. Of course, Pet's conduct was reprehensible and is not to be condoned. However, the information contained in Dittman's report was never conveyed to Safeway personnel. Dittman so testified and so did Young, Safeway's buyer. It thus appears that the Dittman report was never used by Pet in its competitive efforts with Utah Pie.

III

No. 7306

Factual Statement in the Continental Appeals

These appeals involve two claims—the §2(a) claim asserted by Utah Pie and the §2(a) counterclaim asserted by Continental.

Continental marketed its pies under the brand, Morton. It is an eight-inch, 22-ounce pie and is lighter and

smaller than the pies of Utah Pie, all of which are eight-inch, 24-ounce pies.

The counterclaim was based upon the differences between the prices for which Utah Pie systematically sold frozen pies to retail chain stores and the substantially higher prices for which it sold them to other customers in the Salt Lake City market. Such differences resulted from the sales by Utah Pie under private and controlled labels to favored customers, which it began in 1960. Under those labels, Utah Pie sold its only size, grade, and quality of pie to the large favored buyers at substantially lower prices than other buyers were required to pay for Utah Pie's regular Utah brand. For example, in mid-1960 Utah Pie was selling its Utah brand frozen pie for $3.60 per dozen, while it was selling an identical pie under its Frost 'N' Flame brand exclusively to Associated Grocers at $3 per dozen. And on April 4, 1960, Utah Pie by letter offered to sell Safeway, packed under its Bel-air label and delivered to its warehouse in Salt Lake City, frozen apple pies at $3 per dozen and frozen cherry and boysenberry pies at $3.30 per dozen. It was also selling at that time its Sonny Boy brand for $2.88 per dozen, f.o.b. Salt Lake City, for delivery to buyers in Spokane.

On the other hand, Utah Pie's claim against Continental was based upon price differences to noncompeting customers in unrelated geographical areas. It is a "primary line" case. It is mainly based upon two isolated two-week offers of its frozen pies, one made by Continental in June, 1961, and the other in July, 1961 to buyers in the Salt Lake City market at times when Con-

tinental was a marginal seller and Utah Pie was a dominant seller in the area.

It is apparent that Utah Pie's dramatic increase in sales volume in the years 1958 to 1962, inclusive, (see table, page 59 [40] infra) in large part was due to the low prices at which it sold frozen pies to Associated Grocers, Utah Wholesale Grocery and Safeway. Associated Grocers was the largest buyer in the market, serving 150 to 175 retail stores out of its Salt Lake City headquarters. Beginning in 1960 and continuing thereafter, Utah Pie sold Associated Grocers pies under its controlled label, Frost 'N' Flame. That pie, identical with the pie marketed by Utah Pie under its Utah brand, was exclusive with Associated Grocers and was sold at a price 50 to 60 cents per dozen less than Utah Pie charged nonfavored competing purchasers for its Utah brand. Associated Grocers' tremendous competitive advantage, thus attained, caused it to support Frost 'N' Flame almost exclusively in its advertising. It also guaranteed Utah Pie's dominant position in the market by foreclosing the largest buyer from effective competition. Frost 'N' Flame quickly replaced Utah brand as the leading brand.

Utah Pie also produced pumpkin and mince pies for Safeway, the second largest buyer, under Safeway's private label, Bel-air, at prices substantially below those it charged for its identical pie sold under the Utah label to nonfavored competing stores. Utah Pie also continually offered Safeway a preferentially low price on its frozen fruit pies packed under its Bel-air label. Safeway rejected those offers, not because of price, but for another reason fully set out in the Factual Statement in the Pet

Appeal. In its first year of sales of Bel-air mince and pumpkin pies to Safeway, 1960, Utah Pie charged what Utah Pie later itself said was a "rock bottom" price, with the hope that it would induce Safeway to drop its then supplier, Pet Milk, in favor of Utah Pie.

In 1961, Utah Pie began selling its private label Mayfresh pies to Grand Central-American Stores, another of the four large buyers in the Salt Lake City market.

The adverse impact on Utah Pie's competitors was very substantial. From the time Utah Pie gave Associated Grocers its controlled label preference, Continental was unable to sell Associated Grocers a single pie. After Utah Pie began its controlled label sales to Grand Central Stores, Continental was unable to sell that company, and when the arrangement was extended early in 1962 to American Food Stores, which had been acquired by Grand Central, Continental lost the only chain that had been a more or less steady customer. Similarly, as to Safeway, Continental, up to June, 1961, was unable to make a single sale. In that month it made a sale to Safeway's food stores in Salt Lake City.

Continental enjoyed substantial sales in the Salt Lake City market in 1957, but from 1958 to 1960, inclusive, it was a negligible competitor in the Salt Lake City market. With the advent of Utah Pie as a competitor in 1958, Continental's volume in dozens fell to 754 and its market share to 1.3 per cent. In 1959, its volume of sales in dozens was 3,182 and its market share 2.9 per cent. In 1960, its volume of sales in dozens was 3,350 and its market share 1.8 per cent. In 1961, its sales increased and its total volume in dozens of sales in that year was

18,799.5 and its market share 8.3 per cent, but by the beginning of the fourth quarter of 1960, Continental had reduced the cost of its pies laid down in Salt Lake City to a point where it could more nearly compete with Utah Pie's prices in the Salt Lake City market area.

Another basis of comparison is the number of times food retailers advertised Utah Pie's brands and Continental's Morton brand during the years 1957 to 1961, inclusive. This, because the undisputed evidence clearly established that retail newspaper advertising is necessary to frozen pie sales success. The following table shows the number of times retailers advertised the respective brands of Utah Pie and Continental in the five-year period.

	1957	1958	1959	1960	1961
Utah Pie	3	27	30	59	76
Continental	13	0	3	1	5

After the entry of Utah Pie into the Salt Lake City market in 1957, with its lower priced pies, Continental, because of its higher costs of production and transportation, was unable to keep its prices competitive with Utah Pie's prices. In 1960, with the advent of Utah Pie's controlled and private label prices, Continental ceased to maintain a sales representative in the market and was virtually out of the market. However, Continental continued in an effort to reduce its costs of production in order to become competitive. In 1960, it was successful in locating a "co-packing" operation in the heart of the California fruit growing region, which permitted fruit to be processed directly from the trees into the finished pie,

without large intermediate packaging, storing, and shipping expenses. By such efforts, Continental was able to reduce its cost of apple pies laid down at Salt Lake City from approximately $3.75 per dozen in 1958 to approximately $2.80 per dozen in the second quarter of 1961. See chart annexed hereto as Appendix VI. It was also able to reduce its costs of other flavors laid down in Salt Lake City in comparable amounts. Having thus reduced its costs, Continental was again in a position to offer its Morton pies direct to buyers in the Salt Lake City market at prices which it hoped might prove to be competitive. In October, 1960, Continental contracted with a Salt Lake City food broker in an effort to resume distribution of its full line of Morton frozen food products in the Salt Lake City market. For seven months, from November, 1960, to June, 1961, the broker attempted to sell Continental frozen pies at prices generally competitive with Utah Pie's Utah brand.

During that period the broker called on the trade throughout the Salt Lake City market area, offering various short-term price concessions in the form of advertising allowances on pies, as well as other products in the Continental line. On the frozen pies, these price concessions ranged from $1.20 per dozen off the $4.50 list price on mince pies to 84 and 70 cents per dozen off the $4.00 list price on apple, cherry, and boysenberry pies, respectively. At these net prices, Continental was able to make only a total of seven sales to three small buyers in the outlying areas of Ogden, Boise, and Pocatello. It could make no sales to the major buyers, all located in Salt Lake City. The few sales it made did not adversely

affect Utah Pie. During those seven months, Continental's best price offers, made on the price-per-ounce basis used by professional buyers in comparing prices, were competitive with prices offered by Utah Pie on its Utah brand. By June, 1961, it seemed apparent that if Continental was to recapture any portion of the market, it had to make better offers.

Continental was unable to sell to small buyers in the Salt Lake City area, because they lacked the refrigerated storage space necessary to buy direct from Continental. Continental could sell not less than a quarter of a truckload. Utah Pie, with its plant in Salt Lake City, was the only manufacturer who could feasibly sell directly to the small buyers. Of the largest buyers, Associated Grocers was handling Frost 'N' Flame brand at $3.10 per dozen, the lowest price on the market; Grand Central was about to close a deal with Utah Pie for its own private label, Mayfresh, at the same prices charged Associated Grocers; and Safeway was buying its Bel-air frozen fruit pies exclusively from Pet Milk, from whom it could purchase three brands, including its own private label, in combined truckload shipments. Confronted with that situation, Continental's broker recommended that it meet the price being charged to Associated Grocers and offered to Grand Central, by offering apple pies at $2.85 per dozen on full truck quantities. This was approximately the ounce-for-ounce equivalent of Utah Pie's $3.10 price. Indeed, Continental's price was 1.08 cents per ounce and Utah Pie's price was 1.07 cents per ounce. In comparing Continental's prices with Utah Pie's prices, the fact that Continental's pies were 22 ounces in weight and Utah

Pie's pies were 24 ounces in weight should be taken into consideration. Professional buyers evaluate competing offers on a price-per-ounce basis, although retail purchasers do not always give attention to the differences in the size of pies. Moreover, Continental's price was for full truck orders, only, while Utah Pie's price applied to orders of any size, down to a few dozen.

Continental approved the recommendation and a $2.85—$2.89 delivered price, depending on quantity ordered, was offered for a two-week period to those few buyers potentially able to buy from Continental. At the same time, Continental extended on a continuing basis for the Salt Lake City market area an offer of 30 cents per dozen freight allowance. At these prices, Continental made sales to American Food Stores in Ogden and to Associated Grocers in Pocatello, a small independent branch in Pocatello, both of which had previously purchased Morton pies, and at the time of the sale were not purchasing from Utah Pie.

In June, 1961, the merchandising manager for Safeway's food stores in Salt Lake City, purchased 6,250 dozen frozen pies, their requirement for five weeks,[15] from Continental, and in July, 1961, Grocers Wholesale of Salt Lake City, a small wholesaler just starting in business, ordered 1,000 dozen frozen pies from Continental.

[15]Young, the Safeway Frozen Food Department Manager, testified that he has no control over the brands of frozen fruit pies that Safeway Division Managers purchase for their stores; that they are "autonomous in their purchases"; and do not have to stock Bel-air pies; that he has to "sell them on Bel-air."

Utah Pie responded to Continental's offer, which lasted only two weeks and was once renewed a month later for the same period, by reducing its price on all of its 24-ounce apple pies, whatever the brand name, to $2.75 per dozen and offering all the customers unlimited quantities, to be delivered in lots of any size. When Continental learned of such offer by Utah Pie, and the merchandising manager for Safeway's food stores in Salt Lake City urged it to further reduce its price, it agreed with him to cancel an order he had already placed at the $2.85 price; and also offered to cancel another order placed by American Food Stores, rather than reduce its price to Utah Pie's offer, but American Food Stores did not elect to cancel its order. During the period 1958 to 1962, inclusive, in the Salt Lake City market, Continental reached its highest sales volume in June and July, 1961. Thereafter, its sales volume continuously decreased through 1962. Its 1962 sales volume was 8,685 dozen less than its 1961 volume. June and July, 1961, were also high sales volume months for Utah Pie, higher than any of the five preceding months and many other earlier months; and from July, 1961, on through 1962, its sales volume continued to increase. Its sales volume reached a new annual high in 1962, when it showed an increase of 26,968.3 dozen over 1961. Thus, Utah Pie effectively maintained its dominant position and discouraged further efforts by Continental to meet the low prices which Utah Pie continued to maintain throughout 1961 and 1962.

Continental was able in 1961 to increase its volume to 18,799.5 dozen and its market share percentage to 8.3, but in 1962 its volume dropped to 10,114.5 dozen, while Utah

Pie's volume in that year was 129,658.3 dozen, an increase of 26,968.3 dozen over 1961. The record does not reflect facts from which market shares can be computed in 1962.

Invoices of sales of frozen pies by Continental in the Salt Lake City market during the period 1958 to January, 1962, inclusive, showed 142 items were sold at a profit and three items, one in 1958, one in 1961, and one in January, 1962, at a loss, before allocation of overhead costs. Its over-all sales showed a profit before deduction of overhead. After such allocation, an overall loss was reflected. Had Continental been able to develop a substantial volume of sales in such market, it no doubt would have been able to realize a profit after overhead was charged. But when it looked as though its efforts would become fruitful by the contract it secured with the Salt Lake City Safeway stores and Grocers Wholesale in 1961, Utah Pie reduced its price on its Utah and Frost 'N' Flame brands and the contract with Safeway was cancelled. Utah Pie maintained its reduced price for a long period thereafter.

Utah Pie also suffered a loss on its sales of frozen pies in 1958, notwithstanding it captured 66.5 per cent of the Salt Lake City market area in that year and sold a large volume of pies, and notwithstanding its low transportation and selling costs and its other competitive advantages. Its low price in 1958 could not, therefore, be justified by lower costs. By a large increase in its volume in 1959, 1960, and 1961, it was able to make substantial profits, just as it is fair to say Continental could have

done, from 1961 on, had it succeeded in obtaining a substantial volume of sales.

The following table graphically shows a comparison of Utah Pie's and Continental's respective sales volume and market share percentage for the years 1958 to 1961, inclusive, and the sales volume for 1962[16] in the Salt Lake City market.

		Sales Volume in Dozens	% of Market
1958	(Utah Pie	37,969.5	66.5
	(Continental	754	1.3
1959	(Utah Pie	38,372	34.3
	(Continental	3,182	2.9
1960	(Utah Pie	83,894	45.5
	(Continental	3,350	1.8
1961	(Utah Pie	102,690	45.3
	(Continental	18,799.5	8.3
1962	(Utah Pie	129,658.3	
	(Continental	10,114.5	

IV

No. 7308

Factual Statement in the Carnation Appeal

The claim against Carnation was tried on the theory of low prices in the Salt Lake City market and high prices in the Los Angeles market, at which Carnation sold its frozen pies.

Carnation entered the frozen pie business in 1955, by acquiring a Los Angeles company then engaged in manufacturing and selling frozen pies in Utah and elsewhere under the Simple Simon label, or brand. Carnation made substantial improvements in its predecessor's plant at

[16]Percentage of market for 1962 cannot be determined from record.

Torrance, California, (near Los Angeles) and radically altered its distribution system. At all times here material, Carnation marketed its Simple Simon pies in all western markets, that is, Los Angeles, San Francisco, Portland, Boise, Seattle, Spokane, Phoenix, Salt Lake City and Denver. Shortly after Carnation entered the field, the frozen pie business became highly competitive, marked by the introduction into the market of national brands, such as Pet's Pet-Ritz, Continental's Morton, and a number of other national brands. Also, in some of such national markets there were regional brands, such as Mary Elizabeth, County Fair, Frigid Dough, Chet's, and other, and also those of local manufacturers, such as Utah Pie, with their brands.

In order to meet the competitive activities of other manufacturers in the various markets in which it sold its pies, Carnation developed a program of special temporary price reductions, varying from market area to market area, and depending on local competitive conditions. These programs were called "deals" in the trade. In some areas they took the form of advertising allowances, identical with those described in the General Statement of Facts, supra. However, in Utah the allowances were not permitted to be considered in computing "cost" under the Utah "cost plus six per cent" minimum markup law (13-5-7 Utah Code Anno. 1953). Carnation accordingly adopted "off invoice" deals for Utah and other markets where similar statutes were in effect. Both types of deals had the same competitive purpose, namely, to induce the retailer to purchase and advertise Carnation pies and thereby meet the competitive tactics of other manufac-

turers having a like aim. All deals had two aspects in common. They were of a temporary nature and they were offered to all purchasers alike in each market.

Since deals were directed at local competitive conditions, they differed in duration, type and amount in each market area, so that Carnation's net prices in each of the national market areas also frequently differed. At times during the period 1958 to 1961, Carnation's prices in the Utah area were higher than those charged in the Los Angeles area and at times they were lower. There was no relationship between the prices in the two areas. The price in each was determined by local competitive conditions.

In addition to Utah Pie's lower price structure, other competitive conditions in the period 1958 to 1961 affected the market price and the market for Simple Simon pies in the Salt Lake City market. In 1958, Safeway introduced a private brand, Bel-air, manufactured by the Pet Milk Company. Though of a similar grade and quality, it was sold at a lower price than Simple Simon. In late 1959, Utah Pie introduced a controlled label, Frost 'N' Flame, for marketing through Associated Grocers, the largest group of cooperative buyers in that market. In 1961, it introduced another controlled label, Mayfresh, for marketing through Grand Central American in that market. The effect of a controlled label is to tie the purchaser to a single supplier. Such was the effect here on Associated Grocers and Grand Central American.

Frost 'N' Flame and Mayfresh pies were of similar quality with Simple Simon and other brands sold in Utah,

but were introduced and sold at prices considerably below Carnation's prices for Simple Simon pies, as well as Utah Pie's own Utah brand. Utah Pie's Utah brand and its Frost 'N' Flame brand were concededly identical pies with different labels.

Utah Pie's sales to Associated Grocers increased from 18,621 cases in 1959 to 77,894 cases in 1960, and 102,834 cases in 1961, while sales in the entire Salt Lake City market area only doubled in size between 1959 and 1961.

The three largest buyers of frozen pies in the Utah market, whose advertising set the Utah market prices, were Associated Grocers, Safeway, and Utah Wholesale Grocery. In 1961, Utah Pie sold to Associated Grocers nearly nine times as many pies as did Carnation, while in 1958, Utah Pie sold Associated Grocers only three and one-half times as many pies as did Carnation. By the end of 1961, Carnation was entirely out at Safeway, the year in which Utah Pie sold Safeway 36,202 dozen frozen pies, including 6,533 dozen Bel-air mince and pumpkin pies and 11,568 dozen pies under Utah Pie's own brand. In 1958, Carnation sold four times as many pies as Utah Pie to Utah Wholesale Grocery, but in 1961, Utah Pie sold six and one-third times as many pies as did Carnation to Utah Wholesale Grocery. During the four-year period, Utah Pie's sales to the "big three" were over 240,000 dozen, while Carnation's were less than 30,000 dozen.

Utah Pie's books showed that for the fiscal year 1957, the last year in which it was engaged solely in the fresh pie business, it lost approximately $5,500. In its fiscal year 1958, when it seized 66.5 per cent of the frozen pie market through its price cutting activities, it had an op-

erating loss of $1,264.51. During each of the fiscal years 1959, 1960, and 1961, it showed a substantial profit.

To make the comparison between Carnation and Utah Pie more graphic, we set forth in subjoined note 17, in parallel vertical columns, the percentage of the market share in the Salt Lake City market; and in like columns the volume of sales in dozens by Carnation and Utah Pie in each of the years 1958 to 1962, inclusive.

Carnation's total sales volume in the Sale Lake City market in 1957 was 9,286 dozen. But in 1958, in a rapidly

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[17] Market Share

1958	Carnation—10.3%	Utah Pie—66.5%
1959	Carnation— 8.6%	Utah Pie—34.3%
1960	Carnation—12.1%	Utah Pie—45.5%
1961	Carnation— 8.8%	Utah Pie—45.3%

Sales Volume

1958	Carnation— 5,863 doz.	Utah Pie— 37,969.5 doz.
1959	Carnation— 9,625 doz.	Utah Pie— 38,372 doz.
1960	Carnation—22,371.5 doz.	Utah Pie— 83,894 doz.
1961	Carnation—20,067 doz.	Utah Pie—102,690 doz.
1962	Carnation— 5,329.5 doz.* (A lower level than any of the preceding five years.)	Utah Pie—129,658.5 doz.*

*Record does not reflect total sales volume for 1962, hence percentage market share cannot be computed.

Frozen apple pie is the volume leader and price indicator. The frozen apple pie sales in the Salt Lake City market from 1957 to 1961, inclusive, of Utah Pie and Carnation, and of Carnation in 1962, were as follows:

	1957 (4 mo.)	1958	1959	1960	1961	1962
Utah Pie	893.5	10,312	13,285	27,225	46,791.5	
	1957 (12 mo.)	1958	1959	1960	1961	1962
Carnation	3,234.5	2,391	3,164	8,455.5	6,885.5	1,802.5

Another basis of comparison is retailer's advertising. In 1961, retailers advertised Utah Pie's brands 72 times and Carnation's only four times.

expanding market, its volume was only 5,863 dozen. Moreover, its sales volume did not keep pace with the rapidly expanding Salt Lake City market in 1959, 1960 and 1961, and in 1962 its volume in that market fell to an all-time low of 5,329.5 dozen.

Appendix VII, annexed hereto, is a chart which sets forth month by month in the first, second, third and fifth columns of figures the lowest absolute prices offered by Carnation for apple pie in the San Francisco, Spokane, Denver and Salt Lake City markets, and in the fourth column the lowest absolute price at which Utah Pie sold its Utah brand frozen apple pies in the Salt Lake City market. By "absolute price" is meant the list price, less any deals offered, whether direct discounts from invoices or allowances for advertising. This chart covers the period from January, 1958, to August, 1961.

An examination of such chart shows that Carnation's absolute price for apple pie[18] was uniform in the Spokane, Denver and Salt Lake City markets from January, 1958, through October, 1959; that during that period Carnation's price in the Salt Lake City market was always the same as or higher than its price in the fourth market area, San Francisco; and that during such time the only variations in Carnation's prices were in the San Francisco market, with such variations making the price in that market lower than its price in the other areas from time to time.

The chart further shows that in February, 1960, Carnation's Utah price was lower than its San Francisco

[18]Again we use apple pie figures, because it is the most popular, lowest priced, and largest seller of the frozen pies.

price, and in March, April, May, October, November and December, 1960, its Salt Lake City market price was lower than its Spokane market price, but that at no time during 1960 was the Salt Lake City market price the lowest price offered by Carnation in the several markets.

The chart further shows that from January, 1961, to July, 1961, Carnation's Salt Lake City market price was lower than its San Francisco and Spokane market prices, and that in August, 1961, its Salt Lake City market price was lower than its Spokane and Denver market prices, but in 1961 Carnation's Salt Lake City market price was never the lowest price offered by Carnation in the several markets.

The chart further shows that in only eight months of the 44 months here involved was Carnation's price for its Simple Simon pie lower than Utah Pie's price for its Utah brand pie in the Salt Lake City market, the months being October, November and December, 1958, July, 1959, February and March, 1960, and February and April, 1961.

Utah Pie's price for its Frost 'N' Flame pie from the time it was first introduced in August, 1959, through 1961, was always lower than Carnation's price for its Simple Simon pie, in the Salt Lake City market. In Appendix VIII, we set forth Utah Pie's sale prices for its Frost 'N' Flame apple pie and Carnation's offering prices for its Simple Simon apple pie from August, 1959, to August, 1961, inclusive, in the Salt Lake City market. It will be noted therefrom that the prices for the Simple Simon apple pie were always substantially higher than the prices for the Frost 'N' Flame apple pie during that period.

Appendices VII and VIII show that Carnation's prices for its Simple Simon pie from August, 1959, to August, 1961, inclusive, were always higher in the four markets covered in Appendix VII, of which the Salt Lake City market is one, than Utah Pie's prices for its Frost 'N' Flame pie in the Salt Lake City market, in that period, except in Denver in October, 1960, and January, February, March, April and May, 1961. Frost 'N' Flame was sold exclusively to one customer in Salt Lake City.

Carnation's prices for other pies, through its deal offers in the Salt Lake City market, were at times below and at times above Utah Pie's price for its Utah brand.

There was no proof of a price difference by Carnation in the Salt Lake City market and Los Angeles market, the original theory advanced by Utah Pie. Furthermore, the San Francisco market, where price differences did occur, was not an area of stable prices. From time to time advertising discounts from list price were granted and allowed by Carnation and others in the San Francisco market. Moreover, there were substantial differences in competitive conditions in the northern California and Salt Lake City markets, two wholly unrelated markets, throughout the period here involved. Utah Pie, from the beginning, resorted to price cutting to obtain the introduction of its pies and to hold business it had acquired. For example, on October 11, 1960, Utah Pie assured Safeway that the Bel-air price it had made to Safeway was lower than that offered to its regular trade, but was justified by savings Utah Pie would realize in the cost of manufacturing, sale and delivery, but when Utah Pie raised its price for mince and pumpkin pies to Safeway in 1961,

it stated in a letter to Safeway that its 1960 price to Safeway was at "rock bottom" and was made to Safeway, because Utah Pie was anxious to introduce its product to Safeway and felt that the price it made in 1960 would get Safeway's business and "work into something for the future," evidently referring to Bel-air frozen fruit pies. In April, 1960, it offered to sell frozen fruit pies to Safeway at preferentially low prices. And in 1959 Utah Pie sold frozen mince and pumpkin pies to Busley's Super Market, a new customer in Denver, at $3.70 per dozen. Busley's purchasing agent testified it could sell such pies at 33 cents each, a price lower than such pies had ever been sold in Denver, and that at such price "this item would have a terrific drawing power." At that time the going price for such pies was 47 to 49 cents retail and $4.25 per dozen wholesale.

It should be noted that 1958, the year in which during the months of October, November and December Carnation's price for its Simple Simon pie was lower than Utah Pie's price for its Utah brand, was the year in which Utah Pie's market share of all the pies sold in the Salt Lake City market zoomed to 66.5 per cent. And further, that in 1959, when Utah Pie's market share fell to 34.3 per cent, Utah Pie's prices for its Utah brand, except in the month of July of that year, were always lower than Carnation's prices for its Simple Simon pie in the Salt Lake City market. And further, that in 1960, when Utah Pie's prices for its Utah brand were lower, except in two months, February and March, than Carnation's prices for its Simple Simon pie, and when Carnation's prices were always higher than Utah Pie's prices

for its Frost 'N' Flame pie in the Salt Lake City market, Utah Pie's market share increased 11.2 per cent over the previous year and its volume more than doubled, being a 45,522 dozen increase over the previous year, while Carnation's market share increased only 3.5 per cent and its volume only 12,746.5 dozen. And finally, that in 1961, when Utah Pie's prices for its Utah brand were lower, except in two months, February and April, than Carnation's prices for its Simple Simon pie, and when Carnation's prices were always higher than Utah Pie's for its Frost 'N' Flame pie in the Salt Lake City market, Utah Pie's market share decreased two tenths of one per cent and its volume increased 18,796 dozen over the previous year, and Carnation's market share decreased 3.3 per cent and its volume decreased 2,304.5 dozen from the previous year.

The market shares, respectively, of Utah Pie, Carnation, and all other sellers in the Salt Lake City market area in the years 1958 to 1961, inclusive, were as follows:

	1958	1959	1960	1961
Utah Pie	66.5%	34.3%	45.5%	45.3%
Carnation	10.3%	8.6%	12.1%	8.8%
All other sellers	23.2%	57.1%	42.4%	45.9%

What Utah Pie lost in 1959 went not to Carnation, but to other sellers in that market area, as did Carnation's market share loss in that year.

The market share of both Carnation and Utah Pie increased in 1960, but it is clear that those gains resulted from loss of market share by sellers other than Utah Pie and Carnation. In 1961, Carnation's share dropped back to approximately where it was in 1959, Utah pie re-

mained at approximately its 1960 percentage share, and other sellers gained slightly more than Carnation lost.

Carnation's reduction of prices in the Salt Lake City market was made in an effort that was far from successful to compete with the prices at which Utah Pie offered and sold its pies. Clearly, Carnation was never able to compete with Utah Pie's Frost 'N' Flame pie price, and only part of the time with the price at which Utah Pie priced and sold its Utah brand pies.

Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits on sales of frozen pies in other market areas.

Carnation's receipts from sales of frozen pies in the Salt Lake City market exceeded its direct costs, that is, manufacturing, spoilage and transportation costs. It probably also exceeded direct costs, if selling costs were included therein, but on the record before us we can only ascertain with certainty whether its receipts from sales exceeded direct costs, with selling costs included, as to apple pie sales. Carnation's offering prices for apple pie exceeded its direct costs, that is, manufacturing, spoilage, transportation and selling costs in each of the 44 months herein involved, except in February and March, 1960. In those months, its lowest offering price was $3.30 per dozen and its direct costs were $3.39 per dozen. Moreover, its average direct costs for the 44-month period were, manufacturing—$2.934, spoilage—$0.02, transportation—$0.35, and selling—$0.282, or $3.586 per dozen. Its average lowest offering price for apple pie in such period was $3.915 per dozen. Hence, its average lowest

offering price exceeded such average direct costs by $0.329 per dozen.

Carnation made forecasts of losses in different markets from year to year, including the Salt Lake City market area, based on the experience of the previous year and future expectations, but there was no pattern of such forecasts. They varied from year to year and market to market.

V

Applicable Legal Principles

That part of §2(a) here material is set forth below in note 19.

A trial court, in determining whether it will grant a motion for a directed verdict or for judgment n.o.v., should view the evidence in a light most favorable to the party against whom the motion is directed and give such

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[19] 15 U.S.C. §13(a) reads in part as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

party the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and if the evidence and inferences, so viewed and considered, are of such a character that reasonable men in the exercise of a fair and impartial judgment may reach different conclusions, the motion should be denied.[20] In reaching its determination "the court may not pass on the weight of the evidence or" decide "where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed."[21] In determining whether the motions by the defendants in the instant cases should have been granted, we have so viewed and considered the evidence.

A violation of §2(a) embraces two essential elements: (1) A price difference as set forth therein; and (2) an effect resulting therefrom which "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such" price difference.[22]

The fact that a seller doing an interstate business lowers his price in one market area, without making a

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[20] *Kippen v. Jewkes*, 10 Cir., 258 F.2d 869, 873;
Miller v. Brazel, 10 Cir., 300 F.2d 283, 286.

[21] *Anderson v. Hudspeth Pine, Inc.*, 10 Cir., 299 F.2d 874, 876.

[22] *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 553;
American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 104, c.d. 377 U.S. 954;
See also cases cited in note 26, pages 81, 82 [55] infra.

corresponding reduction in all other market areas in which he sells, is not in and of itself a violation of §2(a). That is especially true where the market areas involved are distinct, disconnected, unrelated, and heterogeneous, as are the areas involved in the instant case.[23]

It is true that "the statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect."[24]

Chief Judge Murrah, speaking for this court in Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 Cir., 269 F.2d 950, 957, c.d. 363 U.S. 843, held the word "may" should be construed to mean "reasonable possibility," rather than the more positive phrase "reasonable probability." In support of his statement he cites Mr. Justice Black's opinion in Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, at page 46. Justice Black's statement that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have had such an effect" is based on the opinion of Chief Justice Stone in Corn Products Co. v. Federal Trade Commission, 324 U.S. 726, at page 742, but Justice Black's statement should be read in the light of another part of the Corn Products opinion, wherein

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[23] *Balian Ice Cream Co. v. Arden Farms Co.*, 9 Cir., 231 F.2d 356, 366-368, c.d. 350 U.S. 991;
Anheuser-Busch, Inc. v. F.T.C., 7 Cir., 289 F.2d 835, 840.

[24] *Corn Products Company v. Federal Trade Commission*, 324 U.S. 726, 738;
Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 46.

the Chief Justice said, at page 738 of 324 U.S., "the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, (to substantially lessen competition) but to reach those which would probably have the defined effect on competition." (See note 14 to the opinion in the Morton Salt case, supra, 334 U.S. at page 46.)

"Reasonable possibility" means something more than "mere possibility."[25]

To establish a violation of §2(a) there must be, in addition to proof of price differences, evidence sufficient to support a finding that the lower price, in the market area in which it occurred, did substantially lessen competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with the person who granted such price difference, or the person who knowingly received

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[25]See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-357.

In that case, the court in construing the word "may" in §3 of the Clayton Act, which makes it unlawful for any person to make a lease agreement, to sell or contract for sale of goods, or fix a price charged therefore, or a discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods of a competitors or competitors of the lessor or seller, "where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce," said:

> "* * * But we do not think the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

the benefit thereof; or a finding that there is a reasonable possibility they will do so in the future.[26]

In American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 104, c.d. 377 U.S. 954, the court said:

> "The adverse effect upon competition requisite to establish the Section 2(a) violation * * * is that the price discrimination creates a reasonable probability of substantial injury to competition * * *. Price discrimination does not *per se* constitute a violation of Section 2(a). * * * The price discrimination, * * * must in the particular factual situation involved be capable of raising a reasonable probability of substantially lessening ability to compete. The protec-

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[26] *Elgin Corporation v. Atlas Building Products Co.*, 10 Cir., 251 F.2d 7, 11, c.d. 357 U.S. 926;
Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55, 65;
Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, 367-368, c.d. 350 U.S. 991;
A. E. Staley Mfg. Co. v. Federal Trade Commission, 7 Cir., 135 F.2d 453, 455;
American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 104, c.d. 377 U.S. 954.
See also,
Mid-South Distributors v. F.T.C., 5 Cir., 287 F.2d 512, 517, c.d. 368 U.S. 838.
In *Federal Trade Commission v. Simplicity Pattern Co.*, supra, the court said, in referring to the proof required to make a prima facie case under §§ 2(c), 2(d) and 2(e): *"Unlike §2(a)*, none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." (Italics ours.)
Of course, the defendant has the burden of proving the affirmative defenses provided for in the Act.
Mid-South Distributors v. F.T.C., 5 Cir., 287 F.2d 512, 517 (note 9), c.d. 368 U.S. 838;
Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746, 759-760;
Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 44-45;
United States v. Borden Co., 370 U.S. 460, 467;
Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 514.

tion intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental. * * *"

In Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 Cir., 269 F.2d 950, 954, c.d. 363 U.S. 843, the court said:

"* * * Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. * * *"[27]

Congress sought to protect and foster competition, not to eliminate it.[28]

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[27]See also,
Anheuser-Busch, Inc. v. F.T.C., 7 Cir., 289 F.2d 835, 840;
Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-249.

[28]*Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248-249;
Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, 367-368, c.d. 350 U.S. 991.

In *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, at 248 the court said:

"The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' Staley Mfg. Co. v. Federal Trade Comm'n, 135 F.2d 453, 455. We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. * * *"

By the express wording of the statute, the effect on competition must be substantial. Trivial, remote, or inconsequential effect is not enough. "There must be something more than an essentially temporary minimal impact on competition."[29]

VI

The Decision and Directions for Judgment

The primary question presented by each of these appeals, except the one from the judgment against Continental on its counterclaim, is whether the evidence, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding as to each defendant that it by price differences or other acts had substantially lessened competition, tended to create a monopoly, or injured, destroyed, or prevented competition with it, or there was a reasonable possibility that by such acts it would do so in the future.

As we have heretofore stated, selling at lower prices in the Salt Lake City market than in other market areas in and of itself is not a violation of §2(a).

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[29] *American Oil Company v. F.T.C.*, 7 Cir., 325 F.2d 101, 106, c.d. 377 U.S. 954;
The Borden Company v. F.T.C., 7 Cir., 339 F.2d 953, 957;
Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 357;
Whitaker Cable Corporation v. Federal Trade Com'n, 7 Cir., 239 F.2d 253, 256, c.d. 353 U.S. 938;
Minneapolis-Honeywell Reg. Co. v. Federal Trade Com'n, 7 Cir., 191 F.2d 786, 790, certiorari granted 342 U.S. 940, dismissed 344 U.S. 206.

We do not think Congress intended that nation-wide sellers in different, separate, distinct, heterogeneous and unrelated markets, with different competitive conditions, must sell at the same price levels in each of such markets. However, we think it did intend that such a seller should not indulge in price differences that had a reasonable possibility of substantially lessening competition or tending to create a monopoly, or to injure, destroy, or prevent competition with a person who grants or knowingly receives the benefit of such price differences. But it did not intend to proscribe a seller from fairly meeting competition.

We think the facts here speak for themselves. Utah Pie entered the frozen pie business shortly after the retail purchasers had become price conscious and when a lower retail price was an effective competitive force. It was not encumbered with a large advertising campaign and high manufacturing, transportation and selling costs. It was in a position immediately to take advantage of the situation by offering frozen pies at prices substantially lower than the current market prices in the Salt Lake City market. It was the first and arch price cutter in that market and it engaged in price cutting to obtain and retain frozen pie customers continuously, from the time it entered the business to the end of the period here involved. Lower prices were the principal means it employed to obtain and hold customers and it used such means very effectively. Through them it obtained the patronage of three of the largest retailers in that market. By the use of controlled labels, it effectively tied two

of such major retailers to it as their sole supplier of frozen pies. It very substantially increased its sales volume from year to year, including 1962, and in each of the years 1958 to 1961, inclusive, had a very high percentage share of the total sales volume in the Salt Lake City market.

On the other hand, the defendants, early entrants into the frozen pie business, had depended on quality, ease and quickness of preparation, and large and expensive advertising campaigns to generate consumer appeal. Their manufacturing, transportation and selling costs were high. Their operations, in some respects, lacked efficiency. They could not change to lower prices to generate consumer appeal for their products, without making major changes and adjustments. They had to reduce costs by curtailing advertising, improving their manufacturing and transportation practices, and promoting efficiency in their operations generally. All this took time and none of them, during the period here involved, reached a position where it could fully compete pricewise with Utah Pie.

We, of course, recognize that it was not necessary for Utah Pie, in order to make a case against a defendant, to prove that its actions had already lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with such defendant, and that it was sufficient for it to prove that it was reasonably possible that such actions would do so in the future. But if such action did not substantially lessen competition, or tend to create a monopoly, or injure, destroy, or prevent competition with any of the

defendants during the almost four years here involved; and regard be given also to Utah Pie's substantial volume increase in 1962 and the sharp volume decrease in 1962 of two of the defendants[30] from their 1961 volume, it would seem to be quite unlikely that such a result would probably flow from such actions in the future.

We will now consider the §2(a) claims against each defendant separately.

1. Pet

In the factual statement in the Pet appeal, we set forth the history of Pet in the frozen pie field and the actions it took and the things it did to better enable it to meet the growing lower price competition.

Up to August, 1960, the only frozen pie Pet was selling in the Salt Lake City market was its Pet-Ritz. Due to the lower prices at which other brands were being sold in that market, its Pet-Ritz sales did not keep pace with the rapid growth of frozen pie sales therein. In that market, in 1958, its total Pet-Ritz sales were 16.4 per cent of the total sales of all frozen pies, and in 1959, 12.7 per cent. But from the advent of Utah Pie's controlled label, Frost 'N' Flame, in August, 1959, Pet's sales of its Pet-Ritz pies fell sharply and their total sale percentage in that market dropped to 4.5 per cent in 1960 and to 1.7 per cent in 1961.

Pet sold 25,462.5 dozen Bel-air frozen fruit pies to Safeway in 1959 in the Salt Lake City market, and in December of that year obtained a contract from Safeway

[30]Record does not show Pet's 1962 volume.

to supply its requirement of Bel-air pies for its entire chain of food stores. Pet sold Bel-air frozen fruit pies in the Salt Lake City market in 1959, 1960 and 1961. Those sales afford no support for Utah Pie's §2(a) claims, because uncontradicted evidence clearly established (1) that the reduced price at which they were sold was fully justified by the reduced costs of manufacture, sale and delivery, and (2) that had Pet not sold such frozen fruit pies to Safeway, it would not have purchased them from Utah Pie, for reasons other than price, fully set forth in the Factual Statement in the Pet Appeal.

In August, 1960, Pet introduced its Swiss Miss eight-inch, 20-ounce frozen pie in the Salt Lake City market.

During the years 1958 to 1961, inclusive, the Pet-Ritz pies were sold by Pet in the Salt Lake City market at prices substantially higher than the prices at which Utah Pie sold its brands, all of which were of the same weight and quality as Pet-Ritz, in that market. And from August, 1960, through 1961, Swiss Miss apple pies were sold by Pet at higher prices than the larger and heavier Frost 'N' Flame apple pies were sold by Utah Pie in the Salt Lake City market. During that period and in that market, Swiss Miss frozen fruit pies, other than apple pies, were sold at higher prices than Frost 'N' Flame frozen fruit pies, other than apple, were sold, if consideration be given to difference in weight.

During December, 1959, and the months subsequent thereto, when Pet was selling its Pet-Ritz pies at lower prices in the Salt Lake City market than in other market areas, the sales of Pet-Ritz pies in the Salt Lake

City market had decreased to a point where they were competitively insignificant in that market; and the sales volume of Pet-Ritz pies continued to decrease in that market in 1960 and 1961. Moreover, in the whole period December, 1959, through 1961, Utah Pie's prices for its Utah brand pie were always lower than Pet's prices for its Pet-Ritz pie in that market, although the two pies were of like size and quality.

During the 13-month period, August, 1960, to September, 1961, in only one month was the price for which Swiss Miss pie was sold in the San Francisco market higher than the price for which it was sold in the Salt Lake City market, and the price for which it was sold in that period in the latter market was never lower than the price for which it was sold in the Los Angeles market. And during all of those 13 months, Utah Pie sold its larger and heavier Frost 'N' Flame pie in the Salt Lake City market at prices substantially less than the prices for which Pet sold its Swiss Miss pies in that market.

At all times during the period 1958 to 1962, inclusive, Utah Pie was a vigorous and effective competitor and remained financially prosperous, sound, and strong.

We conclude that the evidence was wholly insufficient to support a finding that Pet, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Pet, by price differences or other acts, would do so in the future, or that Pet had taken or would take in the future

any appreciable amount of frozen pie business from Utah Pie.[31]

We conclude the judgment against Pet should be reversed.

2. Continental

While Continental's sales of frozen pies in the Salt Lake City market were very substantial in 1957, its sales volume was so low in 1958, 1959 and 1960 that it was a negligible competitive factor in that market in those years.

The record is wholly barren of any proof that Continental in 1960 or in 1961, with the exception of one sale made in 1961, made any sales to a customer of Utah Pie,

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[31]The instant case is clearly distinguishable from *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690. There, the claim was based on an alleged violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). No § 2(a) claim was asserted. There, the evidence was adequate to support a jury finding that respondents (defendants below) committed the alleged violations of the Sherman Act and that the specific acts charged to have been done by respondents were performed as a part of a basic plan to monopolize the vanadium market and that the plaintiff had suffered an injury and loss. The question was one of causation.

Here, the evidence wholly failed to establish one of the two essential elements of a § 2(a) violation charged against Pet, which Utah Pie was required to prove, namely, that the effect of the price differences had substantially lessened competition, or tended to create a monopoly, or to injure, destroy, or prevent competition with Pet, or that the price differences were likely to do so in the future. Utah Pie suffered no competitive injury.

Since evidentiary support of a § 2(a) violation was wholly lacking, an essential element for the application of the rule that where the plaintiff proves a loss and an anti-trust violation by the defendant of a nature likely to cause that type of loss, the jury may infer that a causal relation exists, was also lacking. (See *Continental Ore Co. v. Union Carbide Corp.*, supra, p. 697.)

What we have here said as to Pet applies equally, as we will hereafter further show, to Continental and Carnation.

or that because of its sales Continental deprived Utah Pie of any frozen pie business it might otherwise have received.

All sales by Continental's broker in 1960, and up to June, 1961, were to comparatively small buyers and outside of Salt Lake City, and Utah Pie conceded they gave it no competitive difficulty.

In June, 1961, Continental did sell Safeway's local food stores in Salt Lake City 6,250 dozen pies, their requirement for about five weeks. Safeway was then a customer of Utah Pie and was buying from it Utah brand frozen fruit pies and Bel-air frozen pumpkin and mince pies. Utah Pie's sales to Safeway did decrease from 22,084.5 dozen in 1960 to 18,101 dozen in 1961. However, that decrease of 3,983.5 dozen is more than accounted for by the fact that Safeway purchased 4,558.5 dozen less Bel-air mince pies from Utah Pie in 1961 than it did in 1960, because of Utah Pie's refusal to adopt a new carton requested by Safeway. Moreover, Continental's business relations with Safeway, resumed in June, 1961, were short-lived, and after one sale and one order, later cancelled, they were terminated for a second time and not thereafter resumed.

While Continental attained its highest sales volume during the period 1958 to 1962, inclusive, in the Salt Lake City market in June and July, 1961, its sales volume thereafter continuously declined through 1962. On the other hand, Utah Pie's sales volume in June and July, 1961, was also high, higher than any of the preceding five months and many other earlier months, and from

July, 1961, on, Utah Pie's sales volume substantially increased and reached an all-time annual high in 1962. Thus, it will be seen that the effect of Continental's sales in the Salt Lake City market in June and July, 1961, was at most minimal and clearly did not substantially lessen competition in the Salt Lake City market, nor injure or weaken Utah Pie as a competitor of Continental.

We conclude that the evidence was wholly insufficient to support a finding that Continental, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Continental, by price differences or other acts, would do so in the future, or that Continental had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie.

With respect to Utah Pie's belated contention that the verdict against Continental can be supported by evidence of price discrimination violations in the Denver market area, little need be said. It is a departure from the theory on which Utah Pie, by its requested instructions, asked the court to submit its claim to the jury. It is a theory clearly not submitted to the jury by the court in its charge, nor passed on by the jury. The Denver market area was never mentioned and the Salt Lake City market was frequently referred to in the charge. The verdict returned was in a form submitted to the court by Utah Pie, and by its express language showed it was based solely on a price discrimination in the Salt Lake City

market. For the reasons stated, such contention is clearly untenable.[32]

For these reasons, the judgment against Continental on Utah Pie's claim should be reversed.

3. Carnation

Carnation was confronted with powerful competitive factors in the Salt Lake City market. Utah Pie's Frost 'N' Flame pie, introduced in late 1959 and sold exclusively through Associated Grocers, and the Mayfair pie introduced by Utah Pie in 1961 and sold exclusively through Grand Central American, were similar in quality, size and weight with Carnation's Simple Simon, but were introduced and continuously sold at prices substantially below Carnation's price for its Simple Simon pie. In only eight months of the 44 months here involved was Carnation's price for its Simple Simon pie lower than Utah Pie's price for its Utah brand pie, the months being October, November and December, 1958, July, 1959, February and March, 1960, and February and April, 1961.

In 1959, Safeway introduced its private brand, Bel-air. Utah Pie sold Bel-air mince and pumpkin pies to Safeway at prices below Carnation's price for its Simple Simon pies.

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[32] *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808; *Prairie Band of Pottawatomie Tribe of Indians v. Pukkee*, 10 Cir., 321 F.2d 767, 770-771; *Trafford v. Yellow Cab Co.*, 3 Cir., 293 F.2d 43; *National Equipment Rental Ltd. v. Stanley*, 2 Cir., 283 F.2d 600, 603; *Gilby v. Travelers Insurance Co.*, 8 Cir., 248 F.2d 794, 797; *In Re Linda Coal & Supply Co.*, 3 Cir., 255 F.2d 653, 656-657.

The controlled labels effectively tied Associated Grocers and Grand Central American to Utah Pie as their supplier. Utah Pie's sales to Associated Grocers increased from 9,310.5 dozen in 1959 to 38,947 dozen in 1960 and 51,417 dozen in 1961. In 1961, Utah Pie sold Associated Grocers nearly nine times as many pies as did Carnation, while in 1958 Utah Pie sold Associated Grocers only three and one-half times as many pies as did Carnation. In 1958, Carnation sold four times as many pies to Utah Wholesale Grocery as did Utah Pie, but in 1961 the situation was strikingly reversed when Utah Pie sold six and one-third times as many pies to Utah Wholesale Grocery as did Carnation.

By the end of 1961, Safeway, which had theretofore been a customer of Carnation, completely ceased buying pies from Carnation. During the four-year period, Utah Pie's sales to the big three were over 240,000 dozen, while Carnation's were less than 30,000 dozen.

In 1958, the year in which, during three months, the prices of the Simple Simon pie were lower than the prices of the Utah brand pie, Utah Pie's market share of all pies sold in the Salt Lake City market zoomed to 66.5 per cent.

In 1960, when the prices of the Utah brand pies were always lower than the prices of Simple Simon pies, except in two months, and when the prices of Simple Simon pies were always higher than the prices of Frost 'N' Flame pies, Utah Pie's market share percentage increased 11.2 per cent over 1959, and its volume increased 45,522 dozen and was more than double its 1959 volume.

But Carnation's market share percentage increased only 3.5 per cent and its volume only 12,746.5 dozen over its 1959 market share and volume.

In 1961, when the prices of Utah brand pies were always lower than the prices of Simple Simon pies, except in two months, and when the prices of Simple Simon pies were always higher than the prices of Frost 'N' Flame pies, Utah Pie's market percentage decreased two tenths of one per cent and its volume increased 18,796 dozen over the previous year, and Carnation's market share percentage decreased 3.3 per cent and its volume decreased 2,304.5 dozen from the previous year.

In 1959, a year when the prices of Simple Simon pies were always higher, except in one month, than the prices of Utah brand pies, Utah Pie's market share percentage fell to 34.3 per cent, the lowest for the period involved, but its volume increased over the previous year, as did Carnation's, but Carnation's market share percentage decreased from 10.3 to 8.6 per cent, also its lowest for the period involved. And in that year Utah Pie sold approximately four times as many frozen pies as did Carnation.

Finally, in 1962, Utah Pie's sales volume of frozen pies reached an all-time high of 129,658.3 dozen, while Carnation's volume fell to an all-time low of 5,329.5 dozen.

The foregoing facts and other set forth in the Factual Statement in the Carnation Appeal clearly demonstrate that Carnation's sales and prices in the period 1958 to 1962, inclusive, did not substantially lessen competition in the Salt Lake City market, nor injure or weaken Utah

Pie's ability as a competitor of Carnation in the Salt Lake City market. Moreover, a contention that Utah Pie was entitled to hold the extraordinary market share percentage of 66.5, attained in 1958, falls of its own dead weight. To approve such a contention would be to hold that Utah Pie was entitled to maintain a position which approached, if it did not in fact amount to a monopoly, and could not exist in the face of proper and healthy competition.

The evidence clearly shows that throughout the period 1958 to 1962, inclusive, Utah Pie was a vigorous, active, healthy and effective competitor in the Salt Lake City market and refutes a finding that Carnation, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Carnation, by price differences or other acts, would do so in the future, or that Carnation had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie.

We conclude the judgment against Carnation should be reversed.

4. Continental's Counterclaim

The record shows that counsel for Utah Pie intentionally and purposefully refrained from moving at any time for a directed verdict in its favor on the counterclaim.

In his argument to the jury, counsel for Continental limited his claim for a money recovery to nominal damages.

The court submitted to the jury the §2(a) claim and two other claims no longer material and advised the jury that since Continental had limited its claim for a money recovery to nominal damages, if it found for Continental it "need not calculate the full amount" of damages and should award only one dollar.

The jury returned a verdict in which it found that "Utah Pie * * * has discriminated in the prices which it has charged to competing customers for frozen pies in the Utah-Idaho trading area in violation of Section 2 * * * and thereby proximately caused Continental * * * damage," for which it was awarded one dollar.

Thereupon, counsel for Continental moved for judgment on its counterclaim, including an award for attorneys' fees and costs. The court granted the motion. Thereafter, Utah Pie moved for judgment n.o.v., on the ground that the evidence was insufficient to support the finding that Utah Pie violated §2(a), and on the ground that Continental failed to prove it suffered an impact or injury from such a violation. The court granted that motion and entered judgment for Utah Pie.

The Seventh Amendment to the Constitution of the United States provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 50(b) of the Federal Rules of Civil Procedure in part provides:

> "(*b*) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not

granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *."

In Slocum v. New York Life Ins. Co., 228 U.S. 364, "the Court decided that a state statute, providing for a judgment n.o.v. where a verdict should have been directed for insufficiency of evidence, could not, in the light of the Seventh Amendment, be followed in the federal courts pursuant to the Conformity Act." Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07.

Thereafter, however, in Northern Ry. Co. v. Page, 274 U.S. 65, where the federal district court followed the Massachusetts practice of entering judgment on the basis of one of two alternative verdicts requested of the jury because of the court's indecision as to whether a directed verdict was proper, the Court held so to do was not a "'reexamination' within the intendment of the Seventh Amendment." Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07.

Then in Baltimore & Carolina Line v. Redman, 295 U.S. 654, the Supreme Court held a federal district court could enter a judgment n.o.v. where, in accordance with state practice, the district judge had expressly reserved decision on a motion to dismiss or on a motion for a directed verdict. It distinguished the Slocum case, in that there a directed verdict was denied without any reservation of

the question of the sufficiency of the evidence and the jury's verdict was taken unconditionally, while in the Redman case the court expressly reserved its ruling on the motions, based on an asserted insufficiency of the evidence to support a verdict for the plaintiff, a question of law to be resolved by the court, and the verdict for the plaintiff was taken pending the court's ruling on the motions and subject to those rulings. Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07.

The only changes made in the common law practice by Rule 50(b) were to make the reservation of the trial court's decision automatic and limit the time within which the motion for judgment n.o.v. may be made, Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07. It has application only if a motion is made upon which decision can be reserved. It is the reservation of decision, not the making of the motion, which is automatic. Absent a motion for a directed verdict or other like motion, no reservation of decision can be made, the verdict of the jury is returned unconditionally, and it may not be set aside on a motion n.o.v. or reviewed on appeal.[33]

Counsel for Utah Pie assert the instant case is distinguishable and not within the Rule, for the asserted reason that proof of impact, injury, and damage are jurisdic-

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[33]Moore's Federal Practice, 2nd Ed., Vol. 5, §50.08;
Mutual Ben. Health & Accident Ass'n. v. Thomas, 8 Cir., 123 F.2d 353, 355;
Aetna Casualty and Surety Co. v. Yeatts, 4 Cir., 122 F.2d 350, 352;
Dickerson v. Franklin Nat. Ins. Co. of New York, N.Y., 4 Cir., 130 F.2d 35, 37;
Fleming v. Lawson, 10 Cir., 240 F.2d 119, 120-121;
Roberts v. Sawyer, 10 Cir., 252 F.2d 286;
Brown v. Poland, 10 Cir., 325 F.2d 984, 985-986.

tional. Of course, impact and injury to the plaintiff to his damage are essential elements of a claim for violation of §2(a) and must be proven, but that is true with respect to the essential elements of any claim asserted in a civil action. We do not concede that such elements of Continental's claim were not proven here, but even if they were not, the question of the sufficiency of the evidence to establish them had to be properly raised, by motion for a directed verdict or other like motion, before the case went to the jury and its unconditional verdict was returned. Not having been so raised and an unconditional verdict having been so returned, the court could not reexamine the facts found by the jury and pass on the sufficiency of the evidence to support the verdict on a motion for judgment n.o.v.

Utah Pie's conspiracy claim and §2(a) claims and Continental's counterclaim were all tried at the same time. The portions of the evidence pertinent to all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. The jury's task of determining what evidence was pertinent to all of the claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an impossible one. Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation. Therefore, we think the ends of justice will be best served by a new trial of the issues raised on the counterclaim, where the only evidence ad-

duced will be that pertinent to such issues. Accordingly, the judgment n.o.v. in favor of Utah Pie on the counterclaim is reversed and the cause remanded, with instructions to grant Utah Pie a new trial on the counterclaim. 28 U.S.C.A. §2106. In so doing, we must not be understood as implying that we think the evidence adduced at the trial was not sufficient to take the case to the jury on the counterclaim issues.

The judgment in favor of Utah Pie on its §2(a) claims is reversed and the cause remanded, with instructions to enter judgment for the defendants.

Filed May 25, 1965,

Robert S. Cartwright, Clerk.

APPENDIX I

YEARLY SALES OF APPLE PIE BY UTAH PIE COMPANY BY MARKET AREAS AND BRANDS

(Figures in Dozens)

Market Area	No. Customers	Brand	1958	1959	1960	1961
Utah & Idaho	34	Utah Brand	11,169.5	14,885.5	14,707.5	20,390
		Frost 'N' Flame	0	220	13,328.5	27,193
		Mayfresh	0	0	0	520
Total			11,169.5	15,105.5	28,036	48,104
% total sales in all markets			98.7	97.18	83.15	90.6
Oregon	1	Utah Brand	0	0	0	969
Total			0	0	0	969
% total sales in all markets			0	0	0	1.8
Spokane	1	Utah Brand	0	0	753.5	450
		Frost 'N' Flame	0	0	529.5	500
		Sonny Boy	0	0	4,159	3,203
Total			0	0	5,442	4,153
% total sales in all markets			0	0	16.1	7.53
Colorado	5	Utah Brand	0	401	16	23
Total			0	401	16	23
% total sales in all markets			0	2.6	.05	.04

APPENDIX I - continued

Market Area	No. Customers	Brand	1958	1959	1960	1961
Wyo.	5	Utah Brand	39.5	30.5	32	18
Total			39.5	30.5	32	18
% total sales in all markets			.35	.19	.1	.03
Cal. & Nevada	7 (Cal. 1) (Nev. 6)	Utah Brand	118	0	166.5	0
		Frost 'N' Flame	0	5	50	0
Total			118	5	216.5	0
% total sales in all markets			1.04	.03	.6	0
Total, all markets	53		11,327	15,542	33,742.5	55,116

APPENDIX II

LOWEST PET-RITZ OFFERING PRICES IN NINE MARKET AREAS

(Prices are in Dozens)

This appendix sets forth Pet's lowest offering prices for its Pet-Ritz frozen apple pie in each month here involved in each state, except in California, which is divided into Northern California and Southern California, with certain symbols, the meanings of which are set forth below.

Symbols

X = Pet's price higher than Utah Pie's in Utah.

L = Pet's Utah price lower than in other areas.

____ = Lowest Pet price in all of areas shown.

Date	Wyo.	Wash.	Utah	Ore.	Mont.	Idaho	Colo.	No. Cal.	So Ca
1958									
Jan.	4.76	4.76	X4.76	4.76	4.76	4.76	4.76	4.70	4.
Feb.	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.70	4.
Mar.	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.70	4.
Apr.	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.70	4.
May	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.48	4.
June	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.48	4.
July	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.44	4.
Aug.	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.32	4.
Sept.	4.92	4.92	X4.92	4.92	4.92	4.92	4.92	4.32	4.
Oct.	4.92	4.00	X4.92	4.00	4.92	4.92	4.92	4.00	4.
Nov.	4.92	4.00	X4.92	4.00	4.92	4.92	4.92	4.00	4.
Dec.	4.92	4.00	X4.92	4.00	4.92	4.92	4.92	4.00	4.

APPENDIX II - continued

Date	Wyo.	Wash.	Utah	Ore.	Mont.	Idaho	Colo.	No. Cal.	So. Cal
1959									
Jan.	4.32	4.32	X4.32	4.32	4.32	4.32	4.32	4.00	3.9
Feb.	4.32	4.32	X4.32	4.32	4.32	4.32	4.32	4.00	3.9
Mar.	4.32	4.32	X4.32	4.32	4.32	4.32	4.32	4.00	3.9
Apr.	4.32	3.82	X4.32	4.32	4.32	4.32	4.32	4.00	3.9
May	4.32	3.82	X4.32	4.32	4.32	4.32	4.32	4.00	3.9
June	4.32	4.32	X4.32	4.32	4.32	4.32	4.32	4.00	3.9
July	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	3.9
Aug.	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	4.00	3.9
Sept.	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	4.00	3.9
Oct.	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	4.00	3.9
Nov.	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	4.00	3.6
Dec.	4.00	4.00	X3.80L	4.00	4.00	3.80	4.00	3.70	3.6
1960									
Jan.	4.00	2.80	X4.00	3.40	4.00	4.00	4.00	3.70	3.6
Feb.	4.00	2.80	X3.70L	3.40	4.00	3.40	4.00	3.70	3.6
Mar.	4.00	4.00	X3.70L	4.00	4.00	3.40	4.00	3.70	3.8
Apr.	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	3.70	3.6
May	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	3.70	3.6
June	4.00	4.00	X4.00	4.00	4.00	4.00	4.00	4.00	3.6
July	4.00	3.88	X4.00L	4.36	4.00	4.00	4.00	3.52	3.6
Aug.	4.00	4.36	X4.00L	4.06	4.00	4.00	4.00	3.86	3.4
Sept.	4.00	3.86	X4.36	3.86	4.00	3.86	4.00	3.86	3.4
Oct.	4.00	3.86	X4.36	3.86	4.36	3.86	4.00	3.36	3.9
Nov.	4.00	4.36	X4.36	4.36	4.36	4.86	4.00	3.36	3.9
Dec.	4.00	3.76	X4.36	4.36	4.36	4.36	4.00	4.36	3.9
1961									
Jan.	4.00	3.76	X3.70L	4.06	3.70	4.00	3.70	4.00	3.9
Feb.	3.80	3.76	X3.70L	4.06	3.70	4.00	3.70	4.06	3.9
Mar.	3.56	3.76	X3.56L	4.06	3.56	3.56	4.00	3.96	3.8
Apr.	3.64	3.76	X3.56L	3.76	3.56	3.56	3.64	3.86	3.9
May	3.80	3.76	X4.36	4.36	4.36	4.36	3.64	3.86	3.9
June	3.80	3.76	X4.36	4.36	4.36	4.36	4.00	3.86	3.9
July	4.00	3.86	X4.36	4.36	4.36	4.36	4.00	3.86	3.4
Aug.	4.00	3.86	X4.36	4.36	4.36	4.36	4.00	3.76	3.9

1.73 1.00

3.46
78.40
3.86

69
49.80

APPENDIX III

LOWEST APPLE PIE SALE PRICES FOR UTAH BRAND AND FROST 'N' FLAME BRAND IN THE SALT LAKE CITY MARKET

(Prices are in Dozens)

Date	Utah Brand	Frost 'N' Flame
1958		
Jan.	4.15	----*
Feb.	4.30	----
Mar.	4.30	----
Apr.	4.00	----
May	4.00	----
June	4.00	----
July	4.00	----
Aug.	4.00	----
Sept.	4.00	----
Oct.	4.00	----
Nov.	4.00	----
Dec.	4.00	----
1959		
Jan.	4.00	----
Feb.	4.00	----
Mar.	4.00	----
Apr.	4.00	----
May	4.00	----
June	4.00	----
July	4.00	----
Aug.	3.60	3.70
Sept.	3.60	3.70
Oct.	3.50	3.70
Nov.	3.50	----
Dec.	3.60	----

* ---- indicates no sales in that month.

APPENDIX III - Continued

Date	Utah Brand	Frost 'N' Flame
1960		
Jan.	3.50	----
Feb.	3.50	----
Mar.	3.50	3.00
Apr.	3.00	3.00
May	3.50	3.00
June	3.35	3.00
July	3.00	3.00
Aug.	3.50	3.00
Sept.	3.16	3.00
Oct.	3.50	3.10
Nov.	3.50	3.10
Dec.	3.50	3.10
1961		
Jan.	3.43	3.10
Feb.	3.50	3.10
Mar.	3.10	3.10
Apr.	3.50	3.10
May	3.40	3.10
June	2.75	2.75
July	2.75	2.75
Aug.	2.75	2.75

APPENDIX IV

LOWEST PET-RITZ APPLE PIE SALE PRICES IN SEVEN MARKETS

(Prices are in Dozens)

Date	Salt Lake City	San Francisco	Seattle	Portland	Los Angeles	Denver	Spokane
1958							
May	5.16	4.72	4.96	5.00	4.58	4.96	5.16
June	5.00	4.68	5.00	5.00	4.58	4.92	5.16
July	5.00	4.68	5.00	5.00	4.58	4.96	5.16
Aug.	5.00	4.68	4.96	5.00	4.58	4.96	5.16
Sept.	5.00	4.68	5.00	5.00	4.58	4.96	5.16
Oct.	5.00	4.68	4.96	5.00	4.58	4.96	5.00
Nov.	5.00	4.56	4.80	4.84	4.58	4.96	4.84
Dec.	5.00	4.56	4.84	4.80	4.58	4.04	4.84
1959							
Jan.	4.44	4.04	4.36	4.44	3.90	4.36	4.44
Feb.	4.36	3.36	4.36	4.44	3.90	4.36	4.44
Mar.	4.44	4.00	4.36	4.44	3.90	4.36	4.36
Apr.	4.44	4.00	4.36	4.44	3.90	4.32	4.44
May	4.44	4.00	3.82	4.44	3.90	4.32	4.44
June	4.44	4.00	4.44	4.44	3.90	4.32	4.44
July	4.12	4.00	----*	4.64	3.94	4.00	4.04
Aug.	4.12	4.00	----	4.48	3.90	4.00	4.04
Sept.	4.12	4.00	----	4.48	3.90	4.00	4.04
Oct.	4.04	4.04	----	4.48	3.90	4.00	4.04
Nov.	4.12	4.00	----	----	3.90	4.00	4.04
Dec.	3.84	4.00	----	----	3.90	4.00	4.04
1960							
Jan.	4.12	4.00	4.12	----	3.90	4.00	4.12
Feb.	4.12	4.00	4.00	----	3.90	4.00	4.00
Mar.	4.04	4.00	----	----	3.90	4.00	4.04
Apr.	4.04	4.00	4.04	----	3.90	4.00	4.12
May	4.12	4.00	4.12	----	3.90	4.00	4.12
June	----	4.00	4.04	4.28	3.90	4.00	4.12
July	4.28	4.00	4.04	4.04	3.90	4.00	4.04
Aug.	4.28	4.40	4.48	4.40	4.25	4.00	4.48
Sept.	4.28	4.40	4.36	4.36	4.26	4.00	4.48
Oct.	4.64	4.36	4.36	4.40	4.26	4.00	4.48
Nov.	4.64	4.36	4.40	4.40	4.25	4.00	4.48
Dec.	4.64	4.40	4.00	4.48	4.26	4.00	4.08

* ---- indicates no sales in that month.

APPENDIX IV - continued

Date	Salt Lake City	San Francisco	Seattle	Portland	Los Angeles	Denver	Spokane
1961							
Jan.	4.28	4.40	4.40	4.48	4.25	4.00	4.40
Feb.	4.28	4.40	4.36	4.40	4.26	4.00	4.40
Mar.	4.24	4.40	4.35	4.40	4.26	4.00	4.40
Apr.	4.08	4.48	4.36	4.40	4.26	4.00	4.40
May	4.43 high	4.40	4.40	4.48	4.26	3.84	4.40
June	4.64	4.48	4.40	4.40	4.26	3.84	4.40
July	4.64	4.48	4.48	4.40	4.26	4.00	4.40
Aug.	4.64	4.48	4.40	4.40	4.26	4.00	4.40
Sept.	4.64	4.40	3.80	4.40	4.25	4.00	3.80
Oct.	4.64	4.40	3.80	4.48	4.26	4.00	3.80
Nov.	4.64	4.48	3.90	4.40	4.26	4.00	3.85
Dec.	4.64	4.64	4.64	4.48	4.25	4.00	4.36

APPENDIX V

LOWEST SWISS MISS APPLE PIE PRICES IN SEVEN MARKETS

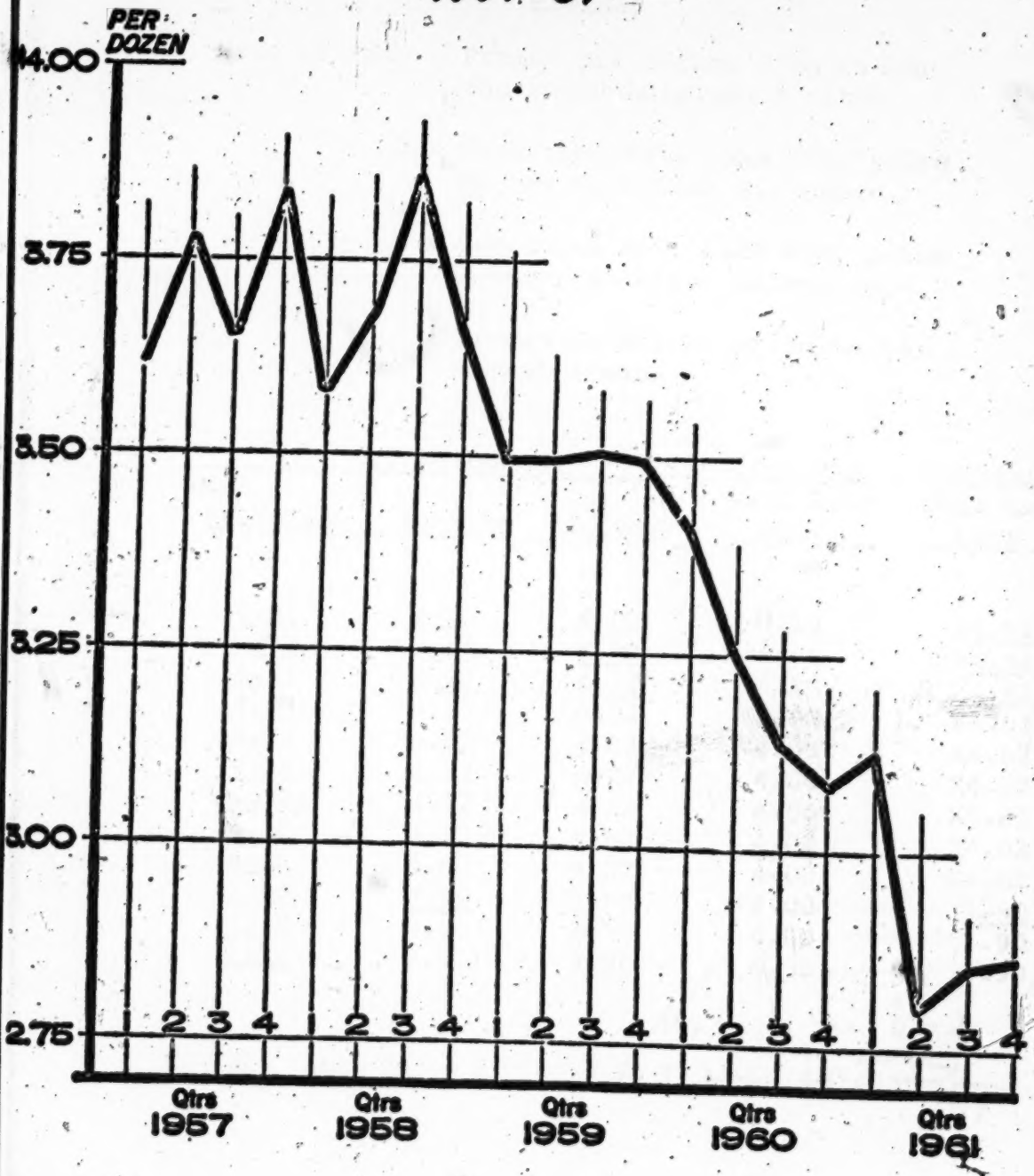
(Prices are in Dozens)

Date	Salt Lake City	San Francisco	Seattle	Portland	Los Angeles	Denver	Spokane
1960							
Apr.	----*	----	----	----	----	3.27	----
May	----	----	----	----	----	3.22	----
June	----	----	----	----	----	----	----
July	----	----	----	----	----	----	----
Aug.	3.29	3.29	----	----	3.05	3.22	----
Sept.	3.25	3.17	3.40	3.40	3.05	3.08	----
Oct.	3.25	3.17	3.19	----	3.05	----	----
Nov.	----	3.05	2.90	----	3.05	2.96	3.15
Dec.	----	3.29	----	----	3.05	----	3.02
1961							
Jan.	3.29	----	3.19	----	3.05	----	3.15
Feb.	3.25	----	3.15	3.44	3.05	----	3.19
Mar.	3.25	----	3.19	----	3.05	3.08	3.19
Apr.	3.25	----	3.19	3.44	3.05	----	3.19
May	3.25	3.29	3.19	----	3.05	3.09	3.19
June	3.25	3.21	3.19	2.94	3.05	----	2.94
July	3.29	3.29	3.02	3.02	3.05	2.94	3.19
Aug.	----	3.17	----	----	3.05	----	3.19
Sept.	3.25	3.21	3.27	3.19	3.05	2.94	3.19
Oct.	3.25	3.17	3.15	----	3.05	----	3.19
Nov.	3.25	3.17	----	3.19	3.05	----	3.15
Dec.	3.25	----	----	----	3.05	----	3.17

* ---- indicates no sales in that month.

APPENDIX VI

AVERAGE COST OF MORTON APPLE PIES LAID DOWN IN SALT LAKE CITY 1957-61



APPENDIX VII

LOWEST APPLE PIE OFFERING PRICES OF CARNATION BY MARKET AREAS, COMPARED TO UTAH PIE COMPANY'S LOWEST APPLE PIE PRICE IN SALT LAKE CITY MARKET FOR ITS UTAH BRAND PIE

(Prices are in Dozens)

Symbols

Name of City = Frozen pie market area within and surrounding such city.

X = Carnation Salt Lake City price higher than Utah Pie price.

L = Carnation Salt Lake City price lower than other market areas.

____ = Lowest Carnation price in all market areas.

Date	Carnation San Francisco	Carnation Spokane	Carnation Denver	Utah Pie Salt Lake City	Carnation Salt Lake City
1958					
Jan.	4.82	4.82	4.82	4.15	X4.82
Feb.	4.82	4.82	4.82	4.30	X4.82
Mar.	4.82	4.82	4.82	4.30	X4.82
Apr.	4.58	4.82	4.82	4.00	X4.82
May	4.38	4.82	4.82	4.00	X4.82
June	4.38	4.82	4.82	4.00	X4.82
July	4.34	4.82	4.82	4.00	X4.82
Aug.	4.22	4.82	4.82	4.00	X4.82
Sept.	4.22	4.82	4.82	4.00	X4.82
Oct.	3.90	3.90	3.90	4.00	3.90
Nov.	3.78	3.90	3.90	4.00	3.90
Dec.	3.78	3.90	3.90	4.00	3.90

Date	Carnation: San Francisco	Carnation: Spokane	Carnation: Denver	Utah: Salt Lake City	Carn: Salt Lake City
1959					
Jan.	3.90	4.22	4.22	4.00	X4.22
Feb.	3.90	4.22	4.22	4.00	X4.22
Mar.	3.90	4.22	4.22	4.00	X4.22
Apr.	3.90	4.22	4.22	4.00	X4.22
May	3.90	4.22	4.22	4.00	X4.22
June	3.90	4.22	4.22	4.00	X4.22
July	3.90	3.90	3.90	4.00	3.90
Aug.	3.90	3.90	3.90	3.60	X3.90
Sept.	3.90	3.90	3.90	3.60	X3.90
Oct.	3.50	3.90	3.90	3.50	X3.90
Nov.	3.50	3.46	3.60	3.50	X3.70
Dec.	3.40	3.46	3.60	3.60	X3.70
1960				In 50 loss s by	
Jan.	3.60	3.30	3.90	3.50	X3.90
Feb.	3.50	3.30	3.30	3.50	3.30L
Mar.	3.24	3.90	3.30	3.50	not 3.30L
Apr.	3.48	3.90	3.30	3.00	X3.48L
May	3.60	3.90	3.30	3.50	X3.84L
June	3.42	3.90	3.36	3.35	X3.84L
July	3.42	3.66	3.60	3.00	X4.02
Aug.	3.86	3.90	3.50	3.50	X3.90
Sept.	3.86	3.90	3.50	3.16	X3.90
Oct.	3.26	3.96	2.50	3.50	X3.90L
Nov.	3.26	3.96	3.10	3.50	X3.86L
Dec.	3.76	4.26	3.10	3.50	X3.86L
1961					
Jan.	3.96	4.36	3.06	3.43	X3.46L
Feb.	3.86	3.60	3.00	3.50	3.46L
Mar.	3.76	3.60	3.00	3.10	X3.46L
Apr.	3.76	3.60	3.00	3.50	3.46L
May	3.76	3.60	3.00	3.40	X3.46L
June	3.76	3.60	3.00	2.75	X3.46L
July	3.66	3.60	3.00	2.75	X3.46L
Aug.	3.11	3.60	3.80	2.75	X3.46L

APPENDIX VIII

COMPARISON OF LOWEST FROST 'N' FLAME APPLE PIE SALE PRICES WITH LOWEST CARNATION APPLE PIE OFFERING PRICES, SALT LAKE CITY MARKET

(Prices are in Dozens)

Date	Frost 'N' Flame	Carnation
1959		
Aug.	3.70	3.90
Sept.	3.70	3.90
Oct.	3.70	3.90
Nov.	----*	3.70
Dec.	----	3.70
1960		
Jan.	---- 15.00	3.90
Feb.	----	3.30
Mar.	3.00	3.30
Apr.	3.00	3.48
May	3.00	3.84
June	3.00	3.84
July	3.00	4.02
Aug.	3.00	3.90
Sept.	3.00	3.90
Oct.	3.10	3.90
Nov.	3.10	3.86
Dec.	3.10	3.86
1961		
Jan.	3.10	3.46
Feb.	3.10	3.46
Mar.	3.10	3.46
Apr.	3.10	3.46
May	3.10	3.46
June	2.75	3.46
July	2.75	3.46
Aug.	2.75	3.46

* ---- indicates no sales in that month.

Appendix B

JUDGMENT

Third Day, May Term, Tuesday, May 25th, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the transcript of record from the United States District Court for the District of Utah and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment in favor of Utah Pie Company on its § 2(a) claims is reversed and the causes are remanded with instructions to enter judgment for the defendants.

It is further ordered that the judgment n.o.v. in favor of Utah Pie Company on the counterclaim of Continental Baking Company is reversed and the cause remanded with instructions to grant Utah Pie Company a new trial on the counterclaim.

Appendix C

Section 2 of the Clayton Act, 38 Stat. 731, § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1952).

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of mo-

nopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as

a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly

to induce or receive a discrimination in price which is prohibited by this section.

Section 3 of the Clayton Act, 38 Stat. 731, § 3 (1914), 15 U.S.C. § 14 (1952).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1952).

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 38 Stat. 731, § 13 (1914), 15 U.S.C. § 26 (1952).

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.